No. 15146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLENN BALLARD, and VIC BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

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Jurisdiction

The jurisdiction of the District Court in this case arose under Title 18, U. S. C. A., Sec. 371, June 25, 1948, C. 645, 62 Stats. 701; Title 18, U. S. C. A., Sec. 545, June 25, 1948, C. 645, 62 Stat. 716 as amended August 24, 1954, C. 890, Section 1, 68 Stat. 782; September 1, 1954, C. 1213, Title V, Section 507, 68 Stat. 1141; June 30, 1955, C. 258, Section 2(c) 69 Stat. 242; and Title 18, U. S. C. A., Sec. 3231, June 25, 1948, C. 645, 62 Stat. 826.

The jurisdiction of this Court was invoked under the provisions of Title 28, U. S. C. A., Sec. 1291 (June 25, 1948, C. 646, 62 Stat. 929) and Rules 37 and 39 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A. (as amended December 27, 1948, effective January 1, 1949).

Statement of Case

This case concerns itself with the activities of certain residents of San Diego County, California, in the smuggling of psittacine birds into the United States from the Republic of Mexico. Broadly speaking any bird with a hooked beak is a psittacine bird, such as parrots, parakeets, and the like.

Appellant Clifford L. Duke, Jr. was an attorney in San Diego. Appellant Vic Buono is a bail bondsman in San Diego. Appellant Louis Glenn Ballard resided in the San Diego area and is an electrician. The jury concluded that: Duke was involved with certain of his clients in a general scheme to clandestinely introduce psittacine birds into this country. He introduced one Helm, an aviator, to his clients with the result that Helm entered the conspiracy and commenced to fly psittacine birds from Mexico to remote desert areas of this country where the other members of the band would pick them up and transport them to retail dealers.

After this general scheme had operated for some months there was a falling out among the group whereupon certain members disassociated themselves from the main conspiracy. The others remained in the smuggling operation. Duke remained friendly with both factions but formed a cabal with dissident members of the band to rob or "hi-jack" the remaining smugglers. Appellant Ballard was a member of this crew. Pursuant to this purpose, Duke insinuated Helm into the smuggling operation. Helm as pilot for the smugglers would inform Duke of the time and place of the illicit import. Duke would notify his co-conspirators in this "hi-jack conspiracy," and they would appear at the correct time and place, rob the smugglers of their merchandise, and transport it to their various outlets; after repeated raids by the hi-jackers the smugglers began to get into pre-

carious financial condition. At about the same time a disagreement broke out among the hi-jackers as to the division of spoils, whereupon the hi-jackers dissolved and some of them went into retirement. Appellants Duke and Buono thereupon told certain of the smugglers that the hi-jacking would be stopped so they could continue operations. Accordingly, a third conspiracy was formed toward this end. As it was necessary to have another airplane, appellant Buono arranged with one Appel for a loan to enable Helm to purchase the plane with which to fly the illegal merchandise. In accordance with this plan several illegal loads of psittacine birds were introduced into the country. The foregoing conspectus is specifically supported by the evidence adduced on trial. Most of the evidence against appellants came from their fellow conspirators who testified for the government, viz: (To quote appellant Ballard [Br. p. 7]):

> "John W. Hadzima, a twice convicted smuggler, Nicholas A. Spicuzza, a twice convicted smuggler, George Todd, a twice convicted smuggler, Raymond Curtis, convicted smuggler, Robert Helm, convicted smuggler, Mary Asconi, admitted handler of psittacine birds known by her to have been smuggled."

There follows a resume of the testimony adduced which it is established must be interpreted in a manner most favorable to the government.

Prior to the year 1949 John Hadzima was a poultry dealer in San Diego, California. In the course of his business he brought chickens from Tijuana, Mexico, across the International Boundary into California. [Tr. 698, 700.] He found that it was an easy and profitable matter to insinuate a psittacine bird or two in among his chickens and in this manner illegally import the psittacine birds into the United States. In time this operation became so profitable that it was necessary for him to get help. Accordingly, he

abandoned the poultry business and devoted himself to the importation of parrots on a fulltime basis. Actual importation was usually done by persons walking across the line with packs on their backs. In the parlance of the smuggling trade, such persons are known as "mules."

In 1952, Hadzima formed a smuggling group with Nicholas Spicuzza and George Todd [Tr. 129, 130]. Spicuzza was a childhood friend of Hadzima's, the two having lived within a block of each other in their boyhood days in Chicago [Tr. 128].

Their elicit operation prospered to such an extent that in 1952 they expanded the operation and took in Fred Steiner and organized what was known as the L. A. Pet Exchange, the purpose of which was to smuggle birds into the United States and then distribute them throughout the country [Tr. 130, 1479]. The L. A. Pet Exchange had four partners, John Hadzima, Nicholas Spicuzza, George Todd and Fred Steiner [Tr. 477, 1479]. The actual smuggling was carried on for the Exchange by three "mules" namely, Samuel Segovia, Donald Hamm (Spicuzza's son-in-law) and Chester Vosburg. While other persons may have been used the bulk of the actual importation was borne by these three men.

Early in the year 1952, Hamm and Segovia were apprehended by Customs Agents [Tr. 131]. The latter part of the year Segovia was apprehended again, this time in conjunction with Vosburg [Tr. 132-461]. After the arrest and conviction Hamm on orders from his father-in-law Spicuzza withdrew from the smuggling operation. Segovia who was a citizen of Mexico jumped his bond and became a fugitive from justice [Tr. 132]. Vosburg was then known to Customs and accordingly his utility as a "mule" was destroyed [Tr. 706]. Thus, as of the first part of 1953 those men comprising the L. A. Pet Exchange had lost the services of the three men who had smuggled the

majority of their birds to them. It was at this juncture that appellant Duke entered the picture.

During the latter part of the year 1952 appellant Duke left the staff of the District Attorney of San Diego, County, to go into the private practice of law. Soon after he embarked upon his private practice of law, appellant Duke was retained by certain of the partners in the L. A. Pet Exchange to represent Vosburg who had been apprehended by Customs Agents (*supra*) [Tr. 133]. At the same time that Duke was representing Vosburg he was also representing Robert Helm who had been apprehended by Immigration Officers on a charge of smuggling aliens [Tr. 1032]. Early in 1953 Duke was successful in obtaining an acquittal for Vosburg [Tr. 134, 1479] but within a few days thereafter Helm was convicted and given probation [Tr. 1032]. Following the Vosburg acquittal, Hadzima, Spicuzza and Todd met with Duke in Duke's office relative to retaining Duke to represent them as their attorney in their business dealings [Tr. 134]. At a meeting Duke asked whether they had ever thought of bringing the birds in from Mexico via airplane [Tr. 142, 143, 706, 1482]. This was a fresh proposal and interested the three smugglers who gave it considerable thought during the ensuing weeks. Subsequently, appellant Duke informed his clients (Todd, Spicuzza, Hadzima, etc.) that he also represented a pilot whom he thought might be amenable to entering into a deal with the smugglers to fly psittacine birds into the United States from Mexico [Tr. 707, 1482]. During February, Robert Helm appeared for sentence in the Federal District Court, Southern District of California, Southern Division at San Diego, and was given probation. Immediately following the granting of probation Duke solicited Helm to meet with his clients relative to the idea that Helm would fly birds into the country for them [Tr. 1036, 1037]. Duke instructed Helm to ask $5,000 a load for his services [Tr. 146, 1036, 734, 1485]. Duke then told the smugglers that

he thought he could obtain Helm's services for some figure in the neighborhood of $1500 a load [Tr. 736, 146, 1485]. After sundry meetings an agreement was reached whereby Helm agreed to fly birds in for certain of the smugglers.

At about the same time Hadzima had a falling out with Spicuzza and Todd in that he felt Spicuzza was cheating him out of certain of the proceeds of their business. As the operation was carried out Hadzima would normally go to Europe to arrange for birds to be shipped to Mexico. Spicuzza and Todd would handle the collection and facilitate the transportation of the birds in Mexico City. They would then arrange to have the birds flown to a remote spot below the border in Mexico where they would be held until a propitious time arose to introduce them into the United States [Tr. 158, 709]. It was Hadzima's feeling that Spicuzza was in effect short-changing him on the birds as they passed through Mexico City [Tr. 709]. Hadzima made known his proposed split to Duke who advised him that the venture was profitable and that he should not openly break with Spicuzza [Tr. 710]. Hadzima acting on Duke's advice superficially maintained his status with Spicuzza but in order to recoup the money that he felt had been withheld from him by Spicuzza he arranged to have a load of Spicuzza's birds hi-jacked during the early part of February, 1953 [Tr. 137, 710, 711, 719, 723]. Subsequently, early in March a second hi-jacking occurred in which one of the employees of the L. A. Pet Exchange, George Monolias was badly beaten [Tr. 149, 150, 1493, 739, 740, 765, 766]. Following the March hi-jacking, Hadzima openly split with Spicuzza and Todd [Tr. 153, 773, 775, 776, 1501]. It was this second hi-jacking which prompted Spicuzza and Todd to contact Helm with the idea of obtaining his services to fly the birds into the country. Accordingly, Spicuzza and Todd contacted Duke and asked Duke how they would go about getting in touch with Helm [Tr. 153, 1503, 1504]. Duke gave Spicuzza Helm's telephone number and Todd

and Spicuzza called him at his home and arranged an interview [Tr. 153]. At this interview it was finally decided that Helm would fly psittacine birds from Mexico into the United States and would be paid in excess of $1,000 a flight by Spicuzza and Todd [Tr. 154, 1505]. It was necessary for Helm to get an airplane so accordingly, Spicuzza and Todd gave him about $2,000 in order that he might go to Oregon and pick up the plane he had in mind [Tr. 154, 155, 1505, 1045]. Helm was somewhat indefinite in his plans so it was arranged between Helm, Spicuzza and Todd that when Helm returned from Oregon he would contact Duke who would in turn contact Spicuzza who would proceed to the agreed rendezvous [Tr. 155, 1505]. This plan was carried out [Tr. 155, 156, 1506].

The first load to be imported under this new scheme of operation was to come in to Apple Valley, California about the first of April, 1953 [Tr. 157, 158, 160, 161, 1049, 1050, 1508, 1521]. Helm acting on instructions from Duke was to report to Duke all arrangements having to do with the time of arrival of the load in the United States [Tr. 1041, 1049, 780]. Duke then in accordance with his agreement with Hadzima and the other hi-jackers passed the information on to Hadzima [Tr. 779]. Pursuant to the information that the load was due in Apple Valley, Hadzima in the company of appellant Ballard and one Purselley proceeded to Apple Valley [Tr. 780]. Due to some inadvertence they missed contact with the smugglers there and missed hijacking the load. Up to this time Helm had known nothing of the plans to hi-jack Spicuzza and Todd. However, he was informed of the plan at a meeting at which appellant Duke and appellant Buono were present. At that time he was told that he would continue to cooperate with them [Tr. 1054, 785, 786].

The next load to be brought into the country by Spicuzza and Todd was to be taken by Helm to Bowling Green, Kentucky. Helm was to pick the birds up in the eastern part of

of Mexico [Tr. 176, 180, 1061] and fly them from there to Bowling Green [Tr. 175, 177, 782, 787, 1061]. Spicuzza left San Diego and went East to await the arrival of the birds. Helm developed plane trouble in El Paso, Texas, and was not able to carry out the plan. At this point Helm telephoned Duke in San Diego to ask him instructions [Tr. 1062, 1064]. Duke directed Hadzima to go to El Paso to straighten things out [Tr. 804]. Hadzima in turn called appellant Ballard and one Pursselley and directed them to proceed to El Paso and meet him there [Tr. 805, 806, 807]. As a result of these meetings, Helm contacted Spicuzza and told him that he would not be able to bring the load into Bowling Green, Kentucky, as planned. Helm then returned to California.

Subsequently, Spicuzza and Helm met in Las Vegas in the company of one Ray Curtis, a bird dealer from Ohio [Tr. 189, 576, 1075]. On the way from Las Vegas to Los Angeles Helm and Spicuzza agreed that the next load of birds should come into Desert Center, California, on May 12, 1953 [Tr. 190, 1075]. This bit of information was conveyed by Helm to Duke [Tr. 810]. Inasmuch as time was too short to organize a successful hi-jack, Helm was requested to stall a day which he did [Tr. 1078]. Spicuzza and Curtis rented a truck in Los Angeles and proceeded to drive to Desert Center to pick up the birds [Tr. 193, 576, 577]. Upon arrival at the airstrip outside of Desert Center, Spicuzza and Curtis waited for Helm to appear [Tr. 195, 578]. As heretofore stated Helm stalled a day and as a result did not arrive at Desert Center until the evening of the second day. At that time the birds were unloaded from the plane and placed in some weeds at the side of the field. Since the hi-jackers had not yet appeared Helm felt impelled to stall pending their arrival. Accordingly, he dropped his billfold on the ground and then requested the help of Spicuzza and Curtis to help him find the papers which blew loose from the billfold [Tr. 200, 581, 1083]. While engaged in this search,

Curtis and Spicuzza were surprised by the hi-jackers viz: Ballard, Hadzima and Pursselley who appeared upon the scene and at gun point forced Spicuzza and Curtis to submit to being bound [Tr. 201, 583, 585, 1086]. After binding Spicuzza appellant Ballard hit him in the head with the butt of a 45 automatic and kicked him about the head and body [Tr. 201, 203, 206, 587, 590]. Ballard, Pursselley and Hadzima then loaded the birds into a truck and returned to Burbank, California, where they transported the birds to an aviary belonging to Mary Ascani. Mary Ascani sold the birds piecemeal and turned the proceeds over to Pursselley [Tr. 1089, 1091, 1764, 1751, 1763, 1767]. Pursuant to agreement the profits from the hi-jacking were to be divided amongst the conspirators including appellant Duke and appellant Ballard. Sometime after the hi-jacking, appellant Duke expressed concern about the fact that he had not received his cut of the proceeds [Tr. 818]. At this time Hadzima drove Buono and Duke to Burbank, California, where they could inspect the birds at the aviary of Mary Ascani in order that Duke might be satisfied that he was not being cheated [Tr. 818, 819, 822]. A few days thereafter Roy Pursselley picked up Helm in Los Angeles and in his company drove to San Diego where he was to pay Duke his share of the proceeds [Tr. 1089]. Pursselley had lost $500 of the money gambling in Gardena, California, and as a result was $500 short in his pay-off [Tr. 1090]. Duke complained to Hadzima and as a result of an investigation conducted by Hadzima the additional $500 difference was made up by Hadzima and Ballard to Duke [Tr. 831, 832, 835, 836]. At about the same time final distribution was made of the proceeds of the Desert Center hi-jack. Both Ballard and Duke received their share [Tr. 1091, 840].

At this point a split occurred in the hi-jacking conspiracy due to Pursselley's shortcomings with the money. A segment of the old hi-jacking conspiracy continued on

from which Duke was to get ten per cent from the proceeds from all the birds brought into the United States by Hadzima and Ballard [Tr. 841, 843].

Ultimately, the agreed division was 45% to Hadzima, 45% to Ballard and the remaining 10% to Duke [Tr. 843, 855, 857].

Helm objected to continuing in the hi-jacking racket and so notified Duke and Buono [Tr. 1100]. They asked Helm whether he wouldn't prefer to continue in business himself as a bird smuggler [Tr. 1101]. Helm said he thought he might be able to but he would need a new airplane since his old plane was well-known to the Customs men [Tr. 1100]. A few days later a meeting was had between Duke, Buono, Helm, Spicuzza and Todd (the latter two were still trying to smuggle birds) [Tr. 220, 221, 1532, 1105]. At this point Buono informed the group that it would be possible to stop the hi-jacking so that business might continue as formerly [Tr. 222, 223, 1106, 1534]. He further stated that he thought he could get the necessary funds to enable the venture to get started, and get Helm an airplane [Tr. 221]. He proposed to arrange a loan from his boss in Los Angeles, a man by the name of Albert Appel [Tr. 221]. As a result of this conversation, Duke Buono and Helm all went to Appel's home in Los Angeles and discussed the matter of the airplane loan [Tr. 1104]. Shortly thereafter Appel agreed to loan Buono $2500. A check in that sum arrived at Buono's office, was endorsed by him and given to Helm who in turn took it to the oil company that owned the airplane and bought the airplane [Tr. 1107]. Subsequently, both Duke and Buono were taken for an airplane ride in the new airplane by Helm [Tr. 1107]. Pursuant to the new or "airplane" conspiracy, Helm flew a load of birds from Carbo (near Hermosillo), Mexico, to the United States [Tr. 228, 1540, 1541]. To finance this trip appellant Buono had advanced over $200 [Tr. 225, 232, 1537].

Subsequent loads were taken from Mexico to Las Vegas, Nevada, where they were held in the aviary of one Robert Crapella [Tr. 239, 240, 243, 247, 1545]. As a result of these latter loads, appellant Buono was repaid his $2500 [Tr. 241, 242, 1546, 1549]. The repayment of the $2500 left Spicuzza short on cash whereupon Buono upon being informed of his problem loaned him another $600 to buy a load of birds [Tr. 246].

As a result of these activities appellants Duke, Ballard and Buono were indicted by the Federal Grand Jury on May 25, 1955. After an extended trial they were convicted as charged with the exception of Buono who was acquitted on Counts IV, V and VI. On September 30, 1955 they were sentenced, Ballard to a total period of imprisonment of nine years, Buono to pay a fine, and Duke to a total period of imprisonment of eleven years. From the judgment of conviction the instant appeal is brought.

The Indictment.

Appellants were charged in a ten-count indictment which was returned May 25, 1955. While it is contained at page 2 through 13, inclusive, of the Clerk's Transcript in view of the repeated references thereto, it is reproduced in full at this point:

COUNT ONE.

(U. S. C., Title 18, Sec. 371.)

Commencing on or about January, 1953, and continuing to April, 1953, in San Diego and Imperial Counties, California, within the Southern Division of the Southern District of California, defendant CLIFFORD L. DUKE, JR., did wilfully and unlawfully conspire and agree with Fred W. Steiner, Nicholas Spicuzza, Olive Spicuzza, John W. Hadzima, Chester W. Vosburg, Charles Walker, George Todd, Roy Pursselley, George Monolias, Samuel Segovia, Don-

ald F. Hamm, Edward V. Ling, and Robert Helm, named as co-conspirators but not as defendants herein, and with other persons to the grand jury unknown to commit offenses against the United States of America, in violation of United States Code, Title 18, Sections 371 and 545, in that defendant CLIFFORD L. DUKE, JR., and the said co-conspirators did conspire and agree together and with each other as follows:

The defendant CLIFFORD L. DUKE, JR., said co-conspirators, and other persons to the grand jury unknown would knowingly and wilfully and with intent to defraud the United States smuggle and clandestinely introduce into the United States merchandise, namely: various and sundry kinds of psittacine birds, from a foreign country, namely: the Republic of Mexico, which merchandise should have been invoiced;

The defendant CLIFFORD L. DUKE, JR., said co-conspirators, and other persons to the grand jury unknown would knowingly and fraudulently import and bring into the United States of America from a foreign country, namely: Mexico, said merchandise, contrary to United States Code, Title 19, Chapter 4 and particularly Sections 1461 and 1484 thereof;

The defendant CLIFFORD L. DUKE, JR., said co-conspirators, and other persons to the grand jury unknown would knowingly and wilfully receive, conceal, sell, and facilitate the transportation and concealment of said merchandise, which said merchandise was unlawfully imported and brought into the United States contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof, knowing said merchandise would be, and was, so imported and brought into the United States;

Pursuant to said conspiracy and to effect the objects thereof, the defendant and said co-conspirators did commit divers overt acts in San Diego and Imperial Counties, California, both within the Southern Division of the Southern District of California, and in other places to the grand jury unknown, among which are the following:

(1) On or about March 1, 1953, in San Diego, California, the defendant CLIFFORD L. DUKE, JR., made a telephone call to Robert Helm;

(2) On or about March 1, 1953, in San Diego, California, defendant CLIFFORD L. DUKE, JR., introduced Robert Helm to John Hadzima, Nicholas Spicuzza, George Todd, and others at the office of defendant CLIFFORD L. DUKE, JR.;

(3) On or about March 28, 1953, in San Diego, California, defendant CLIFFORD L. DUKE, JR., received a telegram from Robert Helm;

(4) On or about March 28, 1953, Robert Helm met with Nicholas Spicuzza, George Todd, John Hadzima, and others and examined and measured the interior of a Grumman amphibian airplane;

(5) On or about April 1, 1953, Robert Helm flew approximately thirty crates of various and sundry psittacine birds, the exact amount being unknown to the grand jury, from Lago Chapella, Baja California, Mexico, to Apple Valley, California, in said Grumman amphibian airplane; and

(6) During the month of May, 1953, defendant CLIFFORD L. DUKE, JR., received the sum of $700.00 cash from said co-conspirators.

COUNT TWO.

(U. S. C., Title 18, Sec. 545.)

On or about April 1, 1953, in Imperial County, California, in the Southern Division of the Southern District of California, defendant CLIFFORD L. DUKE, JR., did knowingly and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States from a foreign country, namely: Mexico, certain merchandise, namely: approximately thirty crates of birds of the psittacine family, which merchandise should have been invoiced, and did fraudulently and knowingly import and bring into the United States from a foreign country, namely: The Republic of Mexico, said merchandise contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484.

COUNT THREE.

(U. S. C., Title 18, Sec. 545.)

On or about April 1, 1953, in San Bernardino County, California, within the Southern District of California, defendant CLIFFORD L. DUKE, JR., did knowingly receive, conceal, and facilitate the transportation and concealment of certain merchandise, namely: approximately thirty crates of birds of the psittacine family, which said merchandise, as the defendant then and there well knew, theretofore had been imported and brought into the United States contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

COUNT FOUR.

(U. S. C., Title 18, Sec. 371.)

Commencing on or about April, 1953, and continuing to December, 1954, in San Diego, Riverside and Imperial Counties, California, within the Southern District of California, defendants CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC BUONO did wilfully and unlawfully conspire and agree with each other and with John W. Hadzima, Phyllis Hadzima, Mary Ascani, Roy Pursselley, and Robert Helm, named as co-conspirators but not as defendants herein, and with other persons to the grand jury unknown, to commit offenses against the United States of America in violation of United States Code, Title 18, Sections 371 and 545, in that defendants CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC BUONO and said co-conspirators did conspire and agree together and with each other as follows:

The defendants, said co-conspirators, and other persons to the grand jury unknown would knowingly and wilfully and with intent to defraud the United States smuggle and clandestinely introduce into the United States merchandise, namely: various and sundry kinds of psittacine birds, from a foreign country, namely: the Republic of Mexico, which merchandise should have been invoiced;

The defendants, said co-conspirators, and other persons to the grand jury unknown would knowingly and fraudulently import and bring into the United States of America from a foreign country, namely: Mexico, said merchandise contrary to United States Code, Title 19, Chapter 4, and specifically Sections 1461 and 1484;

The defendants, said co-conspirators, and other persons to the grand jury unknown would knowingly

and wilfully receive, conceal, sell, and facilitate the transportation and concealment of said merchandise. which said merchandise was unlawfully imported and brought into the United States contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof, knowing said merchandise would be, and was, so imported and brought into the United States;

Pursuant to said conspiracy and to effect the objects thereof, the defendants, said co-conspirators, and other persons to the grand jury unknown did commit divers overt acts in San Diego, Riverside, and Imperial Counties, California, within the Southern District of California, and in other places to the grand jury unknown, among which are the following:

(1) During the month of April, 1953, in San Diego County, a conversation was had in the office of defendant Vic Buono by and between defendants Vic Buono and Clifford L. Duke, Jr., and unindicted co-conspirators John Hadzima and Robert Helm and others to the grand jury unknown;

(2) During the month of May, 1953, in San Diego County, a conversation was had in the office of defendant Vic Buono by and between defendants Vic Buono, Clifford L. Duke, Jr., and the unindicted co-conspirators John Hadzima, Robert Helm, and others to the grand jury unknown;

(3) On or about May 13, 1953, a load of birds of the psittacine family was flown from Baja California, Mexico, to Desert Center, California;

(4) On or about May 13, 1953, defendant Louis Glen Ballard and co-conspirators Roy Pursselley and John Hadzima transported various psittacine birds from Desert Center, California, to the aviary of Mary Ascani in Burbank, California;

(5) On or about June 1, 1953, defendants CLIFFORD L. DUKE, JR., and VIC BUONO observed various psittacine birds at the aviary of Mary Ascani, Burbank, California;

(6) During the month of June, 1953, defendant CLIFFORD L. DUKE, JR., received approximately $3,000.00 in cash; and

(7) During the month of June, 1953, defendant VIC BUONO received approximately $1,500.00 in cash.

COUNT FIVE.

(U. S. C., Title 18, Sec. 545.)

On or about May 13, 1953, in Imperial County, California, in the Southern Division of the Southern District of California, defendants CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC BUONO did knowingly and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States from a foreign country, namely: Mexico, certain merchandise, namely: thirty crates of birds of the psittacine family, which merchandise should have been invoiced, and did fraudulently and knowingly import and bring into the United States from a foreign country, namely: the Republic of Mexico, said merchandise contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484.

COUNT SIX.

(U. S. C., Title 18, Sec. 545.)

On or about May 13, 1953, in Imperial and Riverside Counties, California, within the Southern District of California, defendants CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and *FIC* BUONO did knowingly receive, conceal, and facilitate the transportation and concealment of certain merchandise, namely: approximately thirty crates of birds of the psittacine

family, which said merchandise, as the defendants then and there well knew, theretofore had been imported and brought into the United States contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

COUNT SEVEN.

(U. S. C., Title 18, Sec. 371.)

Commencing on or about June 1, 1953, and continuing to on or about October 31, 1953, in San Diego, Imperial, and Los Angeles Counties, California, in the Southern District of California, defendants CLIFFORD L. DUKE, JR., and VIC BUONO did wilfully and unlawfully conspire and agree with each other and Robert Helm, Nicholas Spicuzza, George Todd, and Albert W. Appel, named as co-conspirators but not as defendants herein, and with other persons to the grand jury unknown to commit offenses against the United States of America in violation of United States Code, Title 18, Sections 371 and 545 in that defendants CLIFFORD L. DUKE, JR., and VIC BUONO and the said co-conspirators did conspire and agree together and with each other as follows:

The defendants, said co-conspirators, and other persons to the grand jury unknown would knowingly and wilfully and with intent to defraud the United States smuggle and clandestinely introduce into the United States merchandise, namely: various and sundry kinds of psittacine birds, from a foreign country, namely: Mexico, which merchandise should have been invoiced;

The defendants, said co-conspirators, and other persons to the grand jury unknown would knowingly and fraudulently import and bring into the United States of America from a foreign country, namely: Mexico said merchandise contrary to United States Code, Title 19, Chapter 4, and specifically Sections 1461 and 1484;

The defendants, said co-conspirators, and other persons to the grand jury unknown would knowingly and wilfully receive, conceal, sell, and facilitate the transportation and concealment of said merchandise, which said merchandise was unlawfully imported and brought into the United States contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof, knowing said merchandise would be, and was, so imported and brought into the United States;

Pursuant to said conspiracy and to effect the objects thereof, the defendants, said co-conspirators, and other persons to the grand jury unknown did commit divers overt acts in San Diego, Imperial, and Los Angeles Counties, California, within the Southern District of California and in other places to the grand jury unknown, among which are the following:

(1) On or about June 1, 1953, a conversation was had in the office of the defendant Vic Buono in San Diego, California, by and between the defendants Vic Buono and Clifford L. Duke, Jr., and the co-conspirators Nicholas Spicuzza, George Todd, and Robert Helm;

(2) On or about June 10, 1953, the defendant Vic Buono endorsed a check drawn by Albert W. Appel in the sum of $2,500.00;

(3) On or about June 10, 1953, a Cessna aircraft was purchased;

(4) On or about June 15, 1953, defendants Vic Buono and Clifford L. Duke, Jr., flew in a Cessna aircraft;

(5) On or about June 25, 1953, Robert Helm flew various and sundry psittacine birds from the Republic of Mexico into the United States to a point within the Southern District of California in a Cessna aircraft; and

(6) On or about September 28, 1953, Robert Helm flew various and sundry psittacine birds from the Republic of Mexico into the United States to a point within the Southern District of California in a Cessna aircraft.

COUNT EIGHT.

(U. S. C., Title 18, Sec. 545.)

On or about June 25, 1953, in Imperial County, California, in the Southern Division of the Southern District of California, defendants CLIFFORD L. DUKE, JR., and VIC BUONO did knowingly and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States from a foreign country, namely: the Republic of Mexico, certain merchandise, namely: various and sundry birds of the psittacine family, which merchandise should have been invoiced, and did fraudulently and knowingly import and bring into the United States from a foreign country, namely: Mexico, said merchandise contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484.

COUNT NINE.

(U. S. C., Title 18, Sec. 545.)

On or about August 28, 1953, in Imperial County, California, in the Southern Division of the Southern District of California, defendants CLIFFORD L. DUKE, JR., and VIC BUONO did knowingly and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States from a foreign country, namely: Mexico, certain merchandise, namely various and sundry birds of the psittacine family, which merchandise should have been invoiced, and did fraudulently and knowingly import and bring into the United States from a foreign country, namely: Mexico, said merchandise contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484.

COUNT TEN.

(U. S. C., Title 18, Sec. 545.)

On or about September 28, 1953, in Imperial County, California, in the Southern Division of the Southern District of California, defendants CLIFFORD L. DUKE, JR., and VIC BUONO did knowingly and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States from a foreign country, namely: Mexico, certain merchandise, namely: various and sundry birds of the psittacine family, which merchandise should have been invoiced, and did fraudulently and knowingly import and bring into the United States from a foreign country, namely: Mexico, said merchandise contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484.

It will be noted that the counts fall into three categories, viz: Counts I, IV and VII are the conspiracy counts setting forth the three separate conspiracies here involved. Counts II, V, VIII, IX and X are smuggling counts, respectively, charging the appropriate appellants with smuggling and clandestinely introducing psittacine birds into the United States from the Republic of Mexico. Counts III and VI are receiving and facilitating counts each charging the appropriate appellants with knowingly receiving, concealing and facilitating the transportation and concealment of certain psittacine birds after illegal importation into the United States. Appellant Duke was charged in all counts, I through X. Appellant Ballard was charged in Counts IV (conspiracy), V (smuggling) and VI (receiving and facilitating). Appellant Buono was charged in Counts IV (conspiracy), V (smuggling), VI (receiving and facilitating), VII (conspiracy), VIII (smuggling), IX (smuggling) and X (smuggling). On trial Appellants Duke and Ballard were found guilty as charged [Tr. 311, 306]. Appellant Buono was found guilty on Counts VII, VIII, IX and X, and acquitted on Counts IV, V and VI [Tr. 308].

ARGUMENT.

QUESTIONS JOINTLY RAISED.

Appellants Were Properly Tried and Sentenced for Violations of 18 U. S. C. A., Sec. 545, Where the Evidence Showed That the Objects, the Importation of Which Was Charged, Were Psittacine Birds.

Since this ground is urged with but minor variations by all three appellants, it will, in the interest of expediency, be treated in its entirety at this point. Additionally, while the following discussion will deal with the substantive counts of the indictment, the same arguments are controlling as to the conspiracy counts.

All three appellants take the position that they cannot properly and lawfully be convicted of violations of 18 U. S. C. A., Sec. 545, where the evidence shows that the wrongfully imported objects were psittacine birds. 18 U. S. C. A., Sec. 545, is the general smuggling statute and provides as follows:

> "Sec. 545. Smuggling goods into the United States
>
> "Whoever knowingly and wilfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which would have been invoiced, or makes out or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or uttered document or paper; or
>
> "Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

"Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

"Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this statute. . . . June 25, 1948 c. 645, 62 Stats. 716."

A conviction under this statute is a felony.

The argument is made that appellants' activities in the smuggling of psittacine birds constitutes a violation, not of the felony statute 18 U. S. C. A., Sec. 545, *supra*, but rather of a misdemeanor health and safety regulation promulgated by the Surgeon General under authority of 42 U. S. C. A., Sec. 264. This last statute provides in applicable portion:

"(a) The Surgeon General, with the approval of the Administrator, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary."

Pursuant to this statute, 42 C. F. R., Sec. 71.152(b) provides:

"Except as provided in subparagraphs (1) and (2) of this paragraph, psittacine birds shall not be brought

into the continental United States, its territories, or possessions, other than the Canal Zone, from any foreign port."

The penal provision which makes violation of the above regulation a misdemeanor is found is 42 U. S. C. A., Sec. 271(a) viz:

"(a) Any person who violates any regulation prescribed under sections 264-266 of this Title, or any provision of section 269 of this Title or any regulation prescribed thereunder, or who enters or departs from the limits of any quarantine station, ground, or anchorage in disregard of quarantine rules and regulations or without permission of the quarantine officer in charge, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or both."

The two-fold argument is advanced by appellants that the evidence upon which the convictions are based shows commission of misdemeanors under 42 U. S. C. A., Sec. 271(a), *supra,* because (1) the Surgeon General by promulgating 42 C. F. R., 71.152(b) made 42 U. S. C. A., Sec. 271(a) exclusively applicable to the importation of psittacine birds, thus removing such importation from the prohibitions of the general smuggling statute (18 U. S. C. A., Sec. 545, *supra*) or, (2) in the event the foregoing result was not worked by the adoption of 42 C. F. R., 71.152(b) both 18 U. S. C. A., Sec. 545 and 42 U. S. C. A., Sec. 271(a) were applicable to the violations at bar. In this latter state of facts, it is contended that violation of neither applicable statute could be proved without proving violation of the other and accordingly, it is claimed prosecution in such a case must always be for the offense carrying the lesser penalty.

As an additional ground appellant Ballard applies to the same argument the provisions of 18 U. S. C. A., Sec. 42 and Sec. 43 which provide in part:

> "Sec. 42. Importation of injurious animals and birds; permits; specimens for museum.
>
> "(a) The importation into the United States or any territory or district thereof, of the Mongoose, the so-called Flying Foxes, or Fruit Bats, the English Sparrow, the Starling, and such other birds and animals as the Secretary of the Interior may declare to be injurious to the interests of agriculture or horticulture, is prohibited; and all such birds and animals shall upon arrival at any port of the United States, be destroyed or returned at the expense of the owner. Nothing in this subsection shall restrict the importation of natural history specimens for museums or scientific collections, *or of certain cage birds, such as domesticated canaries, parrots,* or such other birds as the Secretary of the Interior may designate. The Secretary of the Treasury may make regulations for carrying into effect the provisions of this section.
>
> "(b) Whoever violates this section shall be fined not more than $500 or imprisoned not more than six months, or both." (Emphasis added.)

Section 42 of Title 18 provides a $500 fine and imprisonment of not more than six months or both for the transportation or importation in violation of State, National and Foreign laws of certain prohibited animals or birds.

It is admitted by appellants that these arguments have been adversely determined to their contentions by this Honorable Court in *Steiner v. United States* (1956, 9th Cir.), 229 F. 2d 745, a case involving many of the co-

conspirators of these appellants, wherein Judge Mathews stated at page 749:

> "Appellants were sentenced on Count One under and in conformity with the first paragraph of 18 U. S. C. A., Sec. 371. Steiner, Spicuzza, Walker and Pursselley contend that the offenses the commission of which was the object to the conspiracy charged in Count One were misdemeanors only, namely violations of a regulation, 42 C. F. R., 71.152(b) prescribed by the Surgeon General of the United States under 42 U. S. C. A., Sec. 264 and punishable under 42 U. S. C. A., Sec. 271(a), and that therefore, if sentenced at all on Count One, appellants should have been sentenced under and in conformity with the second paragraph of 18 U. S. C. A. There is no merit in these contentions. Nor is there any merit in Hadzima's contention that the offenses, the commission of which was the object of the conspiracy charged in Count One were punishable under 18 U. S. C. A., Secs. 42 and 43 and under 42 U. S. C. A., Sec. 271(a). Obviously, they were punishable under 18 U. S. C. A., Sec. 545, and hence were felonies."

In *Murray v. United States* (1954, 9th Cir.), 217 F. 2d 583, the same argument was rejected by this Court in considering an appeal from a denial of a motion to correct sentence under 28 U. S. C. A., Sec. 2255. Judge Fee stated:

> "It is doubted that a mere police rule so motivated could dominate the field to the exclusion of express criminal statutes. In any event, no penalty is provided for importations specifically, and the authority is in an omnibus section of a general act which fixes penalties for violation of such regulations in general terms."

The opinion then went on to comment:

> "It would not in any event have repealed the provisions of the statute directed against smuggling, which was passed in its present form in 1948 and fixes a definite penalty for such acts. The latter supersedes all prior statutes *and overrules the regulations no matter when adopted.* Callahan v. United States, 285 U. S. 515, 52 S. Ct. 454, 76 L. Ed. 914."

The absurdity of appellants' contentions becomes clear when it is considered that under the construction advanced any specific Congressional enactment could at any time be repealed, superseded, or modified by the issuance of a regulation at the agency level. It is submitted that the arguments of appellants on this point are definitely determined by the *Murray* and *Steiner* opinions, *supra.*

However, appellants now urge, since the opinion of this Court in *Steiner, supra,* the United States Supreme Court has decided *Berra v. United States* (1956), 351 U. S. 131, an opinion which it is claimed should cause a reconsideration by this Court of the position taken in the *Steiner* opinion. Appellants' argument is apparently founded not on the *Berra* opinion itself but upon the dissent in which Justices Black and Douglas indicated that where there are overlapping statutes under which a defendant may be tried, the Government has no election but to prosecute under the statute prescribing the lesser penalty. It is the position of the appellee in the instant case that such a contention is untenable and erroneous under the Federal cases.

Berra v. United States, supra, was a case out of the Eastern District of Missouri, Eastern Division, concerning wilful attempted evasion of income taxes under Section 145(b) of the Internal Revenue Code of 1939. The issue in that case which has tangential applicability to the issue here under discussion, was Berra's contention that he should have been prosecuted under the misdemeanor Sec-

tion 3616(a) of the Internal Revenue Code rather than under the felony Section 145(b). As stated on page three of his subsequent "Motion to Correct Sentence" his contention was "the election urged by the Government to prosecute either for the felony or the misdemeanor does not exist, thus this Court is permitted only to pronounce the less harsh sentence." It was with this stand that Justices Black and Douglas acquiesced in their dissenting opinion, but the fact is that that opinion treats questions that were only partially briefed and argued. The only question before the Supreme Court was whether the trial court erred in refusing to submit to the jury an instruction requested by defendant under which the jury could have convicted him of the misdemeanor prescribed by Section 3616(a). The Supreme Court held, seven to two, that the trial court correctly refused to do so, and did not attempt to decide whatever other questions might have been raised by the assumed overlapping of Sections 145(b) and 3616(a).

The Criminal Statutes of the United States are not like a jigsaw puzzle in which all the pieces neatly interlock, with no gaps or laps. Many statutes do overlap, and it is not at all uncommon for a single act or transaction to violate more than one provision.

United States v. Beacon Brass Co., 344 U. S. 43, 45;

United States v. Gilliland, 312 U. S. 86, 95-96;

Blockburger v. United States, 284 U. S. 299, 304;

United States v. Noveck, 273 U. S. 202, 206-207;

Albrecht v. United States, 273 U. S. 1, 11.

Where there are two statutes proscribing the same conduct, "the rule is to give effect to both if possible."

United States v. Borden Co., 308 U. S. 188, 198.

"It is a cardinal principle of construction that repeals by implication are not favored. . . . It is not sufficient, as was said by Mr. Justice Storey in Wood v. United States, 16 Pet. 342, 362, 363, to 'establish that subsequent laws cover some or even all of the cases provided for by the (prior act); for they may be merely affirmative, or accumulative, or auxiliary.' There must be a 'positive repugnancy between the provisions of the new law, and those of the old . . .'"

United States v. Borden Co., supra, at 198, 199.

It is also well established that the choice of prosecution or proscribed conduct is left to the Government.

"Where Congress by more than one statute proscribes the private course of conduct, the Government may choose to invoke either applicable law . . ."

Rosenberg v. United States, 346 U. S. 273, 294 (Opinion of Justice Clark);

United States v. Gilliland, 312 U. S. 86, 95-96;

United States v. Beacon Brass Co., 344 U. S. 43, 45;

United States v. Noveck, 273 U. S. 202, 206-207.

It is contended, however, that the allegations of the indictment and the evidence produced by the Government tended to show commission of offenses and conspiracy to commit offenses punishable as misdemeanors under 42 U. S. C. A., Sec. 271(a) or 18 U. S. C. A., Secs. 42-43, and that violation of neither could be proved without proving violation of the other, and that, in these circumstances, the prosecution must be for commission of and conspiracy to commit the offense carrying the lesser penalty.

It is assumed that appellants' above stated argument applies to an alleged congruity of proof between violations of 19 U. S. C. A., Secs. 1461 and 1484 (as expressed through 18 U. S. C. A., Sec. 545 as in the instant indictment) on the one hand, and 42 U. S. C. A., Sec. 271(a) or 18 U. S. C. A., Secs. 42 and 43 on the other hand. However, an examination of these statutes makes it clear that there is a real difference in proof to make out their respective violations. Section 1461, *supra,* provides for inspection of imported merchandise. Section 1484, *supra,* sets out ten requirements prerequisite to the legal importation of merchandise into the United States. Thus, it is submitted, that these sections apply to all merchandise imported into the United States. 42 C. F. R., 71.152 merely imposes additional restrictions for the purpose of health and safety on the introduction of psittacine birds into the United States and its territories and possessions other than the Canal Zone. It is apparent from a reading of subsections (b) (1) and (2) of the above regulation that the requirements imposed are not meant to be exclusive of the requirements under the general importation statutes. Likewise, Title 18, U. S. C. A., Secs. 42 and 43 can in no way be held to supplant or replace the general importation statutes. To the contrary they act as a specific prohibition against the importation of certain animals and birds with minor exceptions. Again, it is submitted that any specimens introduced into the United States under the exceptions contained in Sections 42 and 43, would themselves be subject to the provisions of the general importation statutes. Obviously, it is then quite possible to violate 19 U. S. C. A., Secs. 1461 and 1484 as expressed through 18 U. S. C. A., Sec. 545, without violating either 42 C. F. R., 71.152 or 18 U. S. C. A., Secs. 42 and 43. Although cursory examination might indicate an overlap the offenses defined in the various provisions are plainly not identical.

In any event it is well established in the Federal courts that where the proof shows a violation of two overlapping provisions, the Government is not confined to prosecuting the offense possessing the lesser penalty. The choice remains open to the prosecutor.

Thus, in *United States v. Gilliland,* 312 U. S. 86, the Court sustained convictions under Section 35 of the Criminal Code, as amended in 1934, where the defendants had submitted false and fraudulent reports to a government agency under the so-called "Hot Oil" Act of 1935, 49 Stats. 30. It was conceded that defendants' acts violated both Section 35, the general "false statements" felony statute, and the "Hot Oil" Act, which made such acts misdemeanors. It was argued that defendants could be punished only under the latter Act, since it was (a) more specific, dealing with the precise subject matter involved, (b) later in time, and (c) prescribed a less severe penalty. Arguing for repeal by implication, counsel for the defendants at page 88 of the United States Report:

> "Otherwise, we have the same offense created and punished by two distinct enactments and at the election of the prosecuting officer the offender may receive as punishment not more than six months in jail or $2,000 fine, or ten years in the penitentiary and $10,000 fine."

The Government argued that the sanctions were merely "cumulative, or auxiliary," citing *Wood v. United States,* 16 Pet. 342, 363, and stated:

> "That the same act should be subject to prosecution as a felony or as a misdemeanor is one of the commonplaces of contemporary penal legislation." (Government's Br. p. 33.)

Chief Justice Hughes speaking for a unanimous court stated at pages 95 and 96:

> "In the light of the text of the Act of 1934, amending Section 35, and its legislative history, it is also clear that the fact that the penalty prescribed by Section 35 was greater than that fixed by the Act of February 22, 1935, has no significance in connection with the construction and application of the former. The matter of penalties lay within the discretion of Congress. Section 35 covered a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences according to the circumstances and gravity of particular violations.
>
> "Similarly lacking in merit is the contention that the Act of February 22, 1935, operated to repeal Section 35 as amended in 1934 so far as the latter applied to affidavits, documents, etc. presented in relation to 'hot oil.' There was no express repeal and there was no repugnancy in the subject matter of the two statutes which would justify an implication of repeal. The Act of 1934, with its provisions as to false and fraudulent papers, has its place as a fitting complement to the Act of 1935 as well as to other statutes under which, in connection with the authorized action of Governmental Departments or Agencies, the presentation of affidavits, documents. etc., is required. There is no indication of an intent to make the Act of 1935 a substitute for any part of the provisions in Section 35. See *Posadas v. National City Bank,* 296 U. S. 497, 503, 504; *United States v. Borden Company,* 308 U. S. 188, 198, 199."

To paraphrase the above quotation there is no indication of an intent to make either 42 C. F. R. 71.152 or 18 U. S. C. A. 42 and 43 a substitute for any part of

the provisions of 19 U. S. C. A., Sections 1461 and 1484, as expressed through 18 U. S. C. A., Sec. 545.

Another Supreme Court opinion that strongly supports the Government's contention here is *United States v. Beacon Brass Company,* 344 U. S. 43. The question there was

> "whether by enacting a statute specifically outlawing all false statements in matters under the jurisdiction of the United States 18 U. S. C. A. 1001, Congress intended thereby to exclude the making of false statements from the scope of Section 145(b) [of the Internal Revenue Code]."

The Court with Justice Black dissenting answered in the negative, even though the statute of limitations barred prosecution of the defendant under 18 U. S. C. A. 1001. The Court stated at pages 45 and 46:

> "We have before us two statutes, each of which proscribes conduct not covered by the other, but which overlap in a narrow area illustrated by the instant case. At least where different proof is required for each offense, a single act or transaction may violate more than one criminal statute. *United States v. Noveck,* 273 U. S. 202, 206; *Gavieres v. United States,* 220 U. S. 338. Unlike Section 35(a), Section 145(b) requires proof that the false statements were made in a wilful effort to evade taxes. The purpose to evade taxes is crucial under this section. The language of Section 145(b) which clearly outlaws wilful attempts to evade taxes in any manner is clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income.
>
> "We do not believe that Congress intended to require the tax enforcement authorities to deal differently with the false statements and with other

methods of tax evasion. By providing that the sanctions of Section 145(b) should be 'in addition to other penalties provided by law,' Congress recognized that some methods of attempting to evade taxes would violate other statutes as well. See *Taylor v. United States,* 179 F. (2d) 640, 644. Moreover, since no distinction is made in Section 35(a) between written and oral statements, the reasoning of the Court below would be equally applicable to false tax returns which are, of course, false written statements. But the Court of Appeals have uniformly applied Section 145 to attempts to evade taxes by filing false returns. *e. g., Gaunt v. United States,* 184 F. (2d) 284, 288; *Taylor v. United States, supra,* at 643, 644. Further support for our conclusion can be found in *United States v. Noveck, supra,* where this Court rejected the contention that the enactment of 145(b) imply the repeal general perjury statute insofar as that statute applied to false tax returns made under oath. *c.f. United States v. Gilliland,* 312 U. S. 86, 93, 95-96."

Similarly, in *United States v. Noveck,* 273 U. S. 202, the defendant was indicted and convicted of a felony under the general perjury statute (Sec. 125, Crim. Code, 1909) for having filed false income tax returns. He argued that that provision had been repealed *pro tanto* by the enactment of Section 145(b), Section 253 of the Internal Revenue Act of 1918, making it a misdemeanor wilfully to attempt in any manner to defeat or evade the income tax. Rejecting this contention for a unanimous court, Mr. Justice Brandeis stated:

"The offenses defined in the two statutes are not identical. They are entirely distinct in point of law, even when they arise out of the same transaction or

act . . . . The fact that perjury is a felony, while filing a false return is only a misdemeanor presented no obstacle."

Here again, where the proof showed violations of both statutes, the Court held that the choice was for the Government.

The uniform result reached by the Supreme Court in all cases similar to the present one is not surprising. Since the Department of Justice and the Grand Jury have the power to decide whether an accused shall be prosecuted, they certainly have the purely incidental power to decide which of two applicable statutes to invoke. In performing their duty to "prosecute for all offenses against the United States" 28 U. S. C. A. Sec. 507, United States Attorneys necessarily have a certain degree of discretion. *Hale v. Henkel,* 201 U. S. 43, 65. They have a high degree of discretion with respect to what matters shall be presented to the Grand Jury. *United States v. Thompson,* 251 U. S. 407, and with respect to the selection of the statute under which criminal prosecution will be brought. *Gilliland v. United States, supra; Deutsch v. Aderhold,* 80 F. 2d 677, 678 (5 Cir.), *District of Columbia v. Buckley,* 128 F. 2d 17, 20-21 (C. A. D. C.); *Howell v. Brown,* 85 Fed. Supp. 537, 539-540; *Cf., General Motors Acceptance Corp. v. United States,* 286 U. S. 49, 56, 59-60; *Confiscation cases,* 7 Wall 454, 457; *Clemens v. United States,* 137 F. 2d 302, 305 (4 Cir.); *United States v. Brokaw,* 60 Fed. Supp. 100; *United States v. Lange,* 128 Fed. Supp. 797, 799.

It is submitted by the Government that there is nothing whatsoever in the *Berra* opinion which would cause this Honorable Court to impinge in any way upon the time honored rule that where a single act violates more than one criminal statute, the Government may select the statute under which it chooses to proceed. Accordingly it

is submitted that the *Berra* case contributes nothing which would cause reexamination of the position already taken by this Honorable Court in the *Steiner* and *Murray* cases (both *supra.*) Under the evidence adduced at the trial of the instant case appellants were properly sentenced for violations of 18 U. S. C. A., Sec. 545 for the smuggling of psittacine birds.

The Substantive Counts of the Indictment by Which Appellants Duke and Ballard Were Charged, Are Valid.

Appellant Duke contends that the indictment is fatally defective on its face as to all its substantive counts viz: Counts II, III, V, VI, VIII, IX and X. Appellant Ballard makes the same contention as to Counts V and VI which are the substantive counts on which he was convicted. In support of this contention a two-fold argument is advanced. First it is urged by means of rather elaborate forensic dialetic that psittacine birds are not merchandise which should have been invoiced within the meaning of the Customs laws. A similar contention was advanced in *Steiner v. United States* (1956, 9th Cir.), 229 F. 2d 745 and was emphatically rejected by this Honorable Court, Judge Mathews stating at page 747:

> "Appellants contend that the birds mentioned in Count One were not merchandise within the meaning of 18 U. S. C. A. §545. There is no merit in this contention."

In taking this position this Honorable Court is in accord with the other Circuits since it has generally been held that the term "merchandise" is broad enough to encompass practically all articles which might be introduced into this country. In *United States v. Kushner* (1943, 2nd Cir.), 135 F. 2d 668, cited by appellant Ballard and Appel-

lant Duke, the Court in considering a similar argument advanced relative to gold bullion, stated at page 670:

> "It seems clear, however, that the statutes, 19 U. S. C. A., §§1461, 1484, which require the inspection and invoicing of all 'merchandise' brought into the country include duty free gold bullion. Merchandise is defined by 19 U. S. C. A., §1401(c) as 'goods, wares, and chattels of every description and includes merchandise the importation of which is prohibited.' This is broad enough to include gold. Shaar v. United States, 5 Cir., 269 Fed. 26; Lozano v. United States, 5th Cir., 17 F. 2d 7."

As stated in the *Kushner* case such views are clearly proper in view of the definition of merchandise contained in 19 U. S. C. A., Sec. 1406:

> "(c) Merchandise. The word 'merchandise' means goods, wares, and chattels of every description *and includes merchandise the importation of which is prohibited.*" (Emphasis added.)

It is therefore submitted that psittacine birds are merchandise which should have been invoiced within the meaning of 19 U. S. C. A., Chapter IV.

While of no apparent importance, in passing it might be commented that the *Kushner* case, *supra,* does not support the contention for which appellant Ballard cites it. It is stated at page 17 of Ballard's Brief that an essential ingredient of a violation of the first paragraph of 18 U. S. C. A., Sec. 545, is an intent to defraud the United States of *revenue* (citing *Kushner, supra*). Kushner was decided under 19 U. S. C. A., Sec. 1593(a), a predecessor Statute of present 18 U. S. C. A., Sec. 545. In the former statute it was expressly provided that:

> "If any person knowingly and wilfully, with intent to defraud the *revenue* of the United States, smuggles,

> or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse, any false, forged, or fraudulent invoice or other document or paper, . . . shall be fined in any sum not exceeding $5,000, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court." (Emphasis added.)

The Court in *Kushner* found only great reluctance that there must be an intent to defraud the *revenue* of the United States, stating such to be contrary to the general rule. Section 545, however, does not contain the provision that the intent to defraud the United States must be directed toward its revenue, as a result, while such may have been a requisite under the earlier statute construed in *Kushner,* such a restriction is not applicable to Section 545.

Second, appellant Duke urges the substantive counts of the indictment (II, III, V, VI, VIII, IX and X) are defective in that they allege no facts which would show a violation of Section 545. Appellant Ballard makes the same contention as to Counts V and VI. The gravamen of the argument advanced is that it is insufficient to charge that appellants violated 18 U. S. C. A., Sec. 545 by failing to comply with the provisions of 19 U. S. C. A., Secs. 1461 and 1484. It is pointed out that in *Steiner v. United States* (1956, 9th Cir.), 229 F. 2d 745 *(supra),* this Honorable Court held insufficient, counts of the indictment alleging in the words of the statute a violation of 18 U. S. C. A., Sec. 545, by importation "contrary to law." See also: *Babb v. United States* (1955, 5th Cir.), 218 F. 2d 538 (*supra*).

Initially, it is well to point out that even under the *Babb* case appellants' argument must at best be restricted to

the "receiving and facilitating counts of the indictment" (Counts III and VI). That the argument lacks application to the smuggling counts (II, V, VIII, IX and X) is apparent from a reading of Note 7, page 541 of the *Babb* Opinion wherein it is stated in applicable portion:

> "Hill v. United States, 4 Cir., 42 F. 2d 812-814, charged the smuggling and clandestine introduction into the United States of specifically described merchandise contrary to the provisions of section 593 of the Tariff Act. The court points out that the word 'smuggle' has a well understood meaning. Babb v. United States, 5th Cir., 210 F. 2d 473, 474, does not discuss the point here involved or the Keck case. In addition, the indictment alleged that the cattle were smuggled and clandestinely introduced into the United States, one of the counts said they were brought in without being inspected and invoiced as required by law, some of the counts said they were brought in from Mexico."

In this connection, it will be noted that the "smuggling counts" (Counts II, V, VIII, IX and X) in the case at bar all charge that the psittacine birds here in question were smuggled and clandestinely introduced into the United States and that they were brought in from a foreign country, namely Mexico. Therefore, assuming *arguendo* the applicability of appellants' argument at all, its scope must be confined solely to the receiving and facilitating Counts III and VI.

Later cases establish conclusively that modern law has left the primitive stage of formalism which required the statement of an offense with great formal detail. As stated in *Donnelly v. United States* (1950, 10th Cir.), 185 F. 2d 559:

> "The specificity formally held necessary to charge an offense is no longer required or sanctioned."

The function of the indictment in criminal pleading has recently been succinctly stated by this Honorable Court in the case of *Elwert v. United States* (1956, 9th Cir.), 231 F. 2d 928, 931:

> "An indictment meets the requirement of the Fifth Amendment and Rule 7 of the Federal Rules of Criminal Procedure, 18 U. S. C. A., if it charges all the essential elements of the crime clearly enough to enable the defendant to prepare his defense and to plead the judgment in bar to a future prosecution for the same offense. Todorow v. United States, 9th Cir., 1949, 173 F. 2d 439, 446-447. The sufficiency of an indictment is tested by practical considerations, and defects not affecting substantial rights are disregarded. See, E. G. Hopper v. United States, 9th Cir., 1943, 142 F. 2d 181."

In *United States v. Lemont* (1956, C. A., D. C.), 236 F. 2d 312, 315, the District of Columbia Circuit stated:

> "It is of course the function of an indictment to set forth without unnecessary embroidery the essential facts constituting the offense and thus accurately acquaint the defendant with the specific crime with which he is charged."

In *Hughes v. United States* (1940, 6th Cir.), 114 F. 2d 285, 288, the Court said:

> "The true test of the sufficiency of the indictment is whether it contains the elements of the offense intended to be charged, and sufficiently apprises the accused of what he must be prepared to meet, so that the judgment may be a bar to further proceedings against him for the same offense. Stumbo v. United States, 6th Cir., 90 F. 2d 828; Bogy v. United States, 6th Cir., 96 F. 2d 743."

See also:

Danaher v. United States (1930, 8th Cir.), 39 F. 2d 325;

United States v. Cuddy, 39 Fed. 696, 697;

United States v. George, 228 U. S. 14; 33 S. Ct. 412; 57 L. Ed. 712;

Beard v. United States (1935, C. A., D. C.), 82 F. 2d 837;

Hagner v. United States, 285 U. S. 427; 52 S. Ct. 417, 76 L. Ed. 861;

United States v. Bryson (1953, D. C., N. D., Cal.), 16 F. R. D. 477;

Rule 7(c) Federal Rules of Criminal Procedure, 18 U. S. C. A.

In drawing an indictment it is not necessary that the government go to great detail in setting out the facts involved in the offense. Such matters are properly left to the proof, it being sufficient that the indictment be drafted in the language of the violated statute unless such statute includes by implication an essential element which is not alleged in the indictment.

Lynch v. United States (1951, 5th Cir.), 189 F. 2d 476;

United States v. Hess, 124 U. S. 483;

Robertson v. United States (1948, 5th Cir.), 168 F. 2d 294;

United States v. Franklin (....., 7th Cir.), 188 F. 2d 182, 186;

Todorow v. United States (....., 9th Cir.), 173 F. 2d 439, 447.

As hereinabove set out the second paragraph of 18 U. S. C. A., Sec. 545, provides:

> "Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law . . ."

It is apparent that to state the offense in the words of the statute leaves an apparent ambiguity and indefiniteness in that it is not stated what law the merchandise was imported contrary to. This was the holding of this Honorable Court in *United States v. Steiner, supra,* and also the holding of the Fifth Circuit in *United States v. Babb* (1955), 218 F. 2d 538, *supra.* This deficiency is cured in the receiving and facilitation counts (III and VI) by the provision that the importation was "contrary to U. S. Code, Title 19, Chapter IV, and particularly sections 1461 and 1484 thereof."

It is important to bear in mind that the substantive counts of the instant indictment charge violation of 18 U. S. C. A., Sec. 545, and such violations are stated in substantially the language of the statute. The designation of 19 U. S. C. A., Secs. 1461 and 1484, is to particularize in what way 18 U. S. C. A. Sec. 545 was violated. *Sutton v. United States* (1946, 5th Cir.), 157 F. 2d 661, cited by appellants, is distinguishable. In that case an otherwise legal act (possession of sugar) was sought to be made illegal by the bare allegation in the indictment that such sugar was held "in violation of Second Revised Ration Order No. 3 and General Ration Order No. 8 as amended." As pointed out by the Court, these Orders occupy pages and pages of looseleaf papers and it was impossible even upon a diligent search to ascertain pre-

cisely which of the many prohibitions and conditions thereof it was contended that the defendant had violated. As the Court stated in denying the Petition for Rehearing. at page 670:

> "Orders No. 3 and 8 are a looseleaf code of regulations and prohibitions that were promulgated, construed, explained by rationales and amended repeatedly. The information in this case amounts to no more than charging the defendant with violating this Criminal Code by having in his possession and under his control 10,000 pounds of sugar. If this judgment were affirmed, the uncertainty as to the nature and cause of the accusation would render equally uncertain a a plea of former conviction if later the appellant should be brought to trial for acquiring, transporting or possessing, this same sugar without a ration order or certificate. By this test, as well as by the other one stated in our prior opinion the information is insufficient to meet the requirements of the Sixth Amendment."

And continuing on page 671:

> "The petition for rehearing fails to point out 'where' the possession of sugar is in violation of said section 17.11. It cites this section but mentions no other relevant provisions supplementary thereto. It also cites section 19.3 of Order No. 3, which provides that each consumer is permitted to obtain five pounds of sugar during a specified period; but this is far from citing any section of Order No. 3 that prohibits the possession of sugar not in accordance with a ration order. Undeterred by this, the petitioner argues that a brief survey of the history of sugar rationing discloses that the mere possession of sugar in excess of the quantity allotted to individuals is an offense under the regulations, but it cites no applicable section, and in the course of such argument there is a

> palpable shift by petitioner from Order No. 3 to Order No. 8. Since the combined research of the court and counsel has failed to discover any provision of Order No. 3 supplementary to section 17.11, prohibiting the mere possession of sugar, we adhere to our former ruling that there is no such prohibition as far as Order No. 3 is concerned."

From this latter quotation it is apparent that had petitioner been able to point out any section of Order No. 3 that prohibited the possession of sugar not in accordance with the ration order a violation would have been made out. Contrast *Sutton* with the instant case where violation of the Customs law is alleged in the statutory language and where the specific violation is particularized by designation of 19 U. S. C. A. Secs. 1461 and 1484. Here, definite sections are cited which contain provisions with which appellants failed to comply when importing and otherwise introducing merchandise into this country. Where the information in *Sutton* palpably failed to apprise the defendant of what specific order, statute, or regulation, he had violated, the indictment in the instant case is quite definite in that regard.

Form 5 of Appendix of Forms of the Federal Rules of Criminal Procedure is a form indictment for violation of 26 U. S. C. Sec. 2833 (present Title 26, U. S. C., Sec. 5606[a]). The charge that ". . . John Doe carried on the business of a distiller without having given the bond *as required by law*" sufficiently charges the foregoing offense according to the approved form.

See also:

> *United States v. Perl* (1954, 2nd Cir.), 210 F. 2d 457, 458.

All basic requisites of an indictment were fulfilled by the instant indictment. The receiving and facilitating

counts (III and VI) here under discussion set out the statute violated (18 U. S. C. A. Sec. 545), the date and place of violation, the defendants, their unlawful acts, the merchandise involved, their criminal knowledge and the particular statutes contrary to which they acted. All the essential elements of the crime are charged. The appellants are apprised of the charge in such a way as to be able to adequately prepare their defense. If convicted or acquitted on these counts, the charge is stated with sufficient particularity to enable them to interpose a plea of jeopardy to any subsequent attempted prosecution on these facts.

In *Steiner v. United States* (1956, 9th Cir.), 229 F. 2d 745, *supra,* this Honorable Court in holding portions of that indictment insufficient, stated at page 748:

> "However, each of Counts Eight, Nine, Ten and Eleven fail to state what law (other than 18 U. S. C. A., §545) the importation mentioned therein was contrary to, or in what respect such importation was contrary to such law."

And in *Babb v. United States* (1955, 5th Cir.), 218 F. 2d 538 (heavily relied upon by appellants), it is stated at page 541:

> "We hold that the indictment should have alleged some fact or facts showing that the cattle in question were imported or brought in contrary to some law."

It is submitted that the complete answer to the above stated requirements of these two cases is found in the statement in the instant indictment that the illegal importation was contrary to 19 U. S. C. A. Chapter IV, and particularly Sections 1461 and 1481 thereof. Accordingly, it is the position of the United States that the substantive counts of the indictment contain sufficient facts to constitute an offense punishable under the laws of the United States.

QUESTIONS INDIVIDUALLY RAISED.

Since the two foregoing sections involve questions raised jointly by two or more appellants they were, in the interest of expediency, treated jointly albeit out of order. All grounds raised herein below are raised in each instance by only one appellant. Accordingly they will be dealt with hereinafter as arguments by the single appellant as respectively indicated.

Clifford L. Duke, Jr.

Appellant Duke's Constitutional Rights Under the Fifth and Sixth Amendments Were Not Infringed by Reason of the Rulings of the Court Requiring Him to Elect Whether He Would Accept Counsel or Would Proceed in Propria Persona.

Appellant Duke first raises the question that his constitutional rights under the Fifth and Sixth Amendments were infringed by certain rulings of the Court below restricting to some extent his activities in acting as his own counsel. Appellant Duke alleges that an accused in a federal criminal case has an absolute right to the effective assistance of counsel. He further alleges that an accused in a federal criminal case has an absolute right to act as his own counsel. At the commencement of the trial below appellant Duke sought to associate Clifford Fitzgerald, Esq., a member of the San Diego Bar. At this point he was informed by the Court below that he could either appear *in propria persona* or could be represented by counsel but that he could not do both simultaneously. It is this ruling, basically, which gives rise to this particular ground of appeal. Inasmuch as appellant Duke concludes that the trial court at the very least abused his discretion,

appellee deems it necessary to set out pertinent portions of the record in this regard. Thus, the problem had its inception on page 28 of the transcript wherein the following colloquy took place:

"Mr. Duke: I am representing myself, your Honor, associating Mr. Fitzgerald.

Court: You can't do that. Is Mr. Fitzgerald of record?

Mr. Duke: No, your Honor.

Court: Well, you had better get yourself a lawyer of record, or if you are going to defend yourself bear in mind the rule. Now I don't know how firm a rule it is, but it is a rule that those who give testimony cannot argue the case to the jury. And if you intend to testify, bear in mind that there are rules which would prevent your arguing the case to the jury, if you do that. If you want Mr. Fitzgerald to be your attorney, get him of record. If he is of record you cannot act in pro per or as an attorney with him. . . .

The Court: We have to be practical about the case.

Mr. Fitzgerald: That is right.

The Court: . . . And if there are rules of law which govern the situation, which there must be, although I suspect that a lot of them are what Justice Oliver Wendell Holmes said they were not. He said, 'The law is not a brooding omnipresence in the skies, but is the articulate voice of a sovereign or quasi sovereign.' I don't know whether the sovereign has articulated on all the subjects.

But Mr. Duke is a member of the Bar of this court.

Mr. Fitzgerald: That is right.

The Court: Mr. Duke is a defendant in this case. Mr. Duke is necessarily emotionally involved in it because he has, if he should be convicted here, more to lose than any other defendant. I have not yet physically received the pretrial statement of the Government. All I know is from reading the indictment. Mr. Duke is charged with enough to make his future professional life very dubious here if he should be convicted of any one of the counts.

Mr. Fitzgerald: That is right.

The Court: Now, he being necessarily involved as a man would, emotionally in the problem, it is just not a good thing for him to be participating as an attorney in the courtroom. You know Mr. Fitzgerald, how many times a lawyer will say or do things which will militate very strongly against him when he acts under the stress of emotion.

Mr. Fitzgerald: Yes.

The Court: How much more he is apt to do that if he is both client and lawyer. I don't think it is practical.

Of course, you are in the position of having a client here who, being a lawyer and having had the experience he has had with early litigation which will be mentioned in this case, and facts which have been litigated in other cases, you can draw a great deal from just conferring. *And I don't mean to indicate that you should not have the benefit of full conference with him, and we will recess whenever conferences are actually needed, if the requirements of justice are such we should do that.* [Emphasis added.] But for Mr. Duke to undertake to examine witnesses or to argue motions or evidence, I think, it is very unwise from the standpoint of Mr. Duke himself, from the standpoint of your having adequate control of his case, and from the standpoint of an orderly

procedure here. I don't think if you give it serious consideration you will quarrel too much with the indication the court has made, that all questioning and argument should be made by you and not by you and Mr. Duke.

Mr. Duke: I didn't . . . —please of the court, I had never intended to argue the case. I realize the rule, that having testified myself, I wouldn't be permitted to argue nor would it be wise for me to argue my own testimony or any of the testimony. And I realize my own emotional feelings in the case.

However, as to certain matters, such as questions of law that might come up before your Honor that I am versed in, having gone through many motions of a similar character in the other case, and having filed a brief in the Court of Appeals for the Ninth Circuit on questions of law, I feel it would take . . . I could argue those without expending too much time in any additional research.

I think I could contain my emotions in your Honor's presence so I can present those arguments as an advocate and not as a defendant. I have heretofore appeared as my own counsel and argued the motions and have . . .

The Court: You haven't been indicted before, have you?

Mr. Duke: I mean in this particular case, your Honor. All the motions heretofore I have argued on my own behalf.

The Court: Do you have any objection to Mr. Duke participating in the argument on motions?

Mr. Bowler: On motions?

The Court: Yes.

Mr. Bowler: None.

Mr. Stewart: That is out of the presence of the jury, I assume.

The Court: They usually are. On motions which are being presented out of the presence of the jury the court will hear you, Mr. Duke."

Appellant Duke raised no objection to the above ruling apparently acquiescing in it since he then proceeded to go on to a further subject wherein he said at page 33 of the transcript:

"Mr. Duke: Then there is one more thing. There will probably be called one or two witnesses that I would like very much to examine myself. I won't share that examination with—that is, I wouldn't have two counsel on my behalf examining the witness, but it will not be very much. But I would like to reserve that right to examine one or two witnesses.

* * * * * * * *

[Tr. p. 34.]

"The Court: Gentlemen, it appears to me so far as I can decide that matter, it must be decided on principles of law rather than upon principles of whether it is wise for Mr. Duke or pleasant for the litigants and other lawyers and witnesses. Now, a man is always entitled to be represented by counsel of his own choosing. You have opposed to that the restrictions which are placed upon lawyers who also have other capacities in the case. I don't know at the moment whether I can restrict Mr. Duke and Mr. Fitzgerald from having Mr. Duke participate in the examination of witnesses. If I can I will, because I don't think he should do it. It is inviting too much of the sort of thing which lawyers, in the heat of advocacy, as the appellate court say, will do, which should not be done. It is inviting the argumentive question; which often to a venireman sounds like testimony, but is, in fact, interrogation. It is inviting the overstepping of a kind that a person, emo-

tionally involved and personally involved as a litigant is, shouldn't do.

So if I can keep him from doing it I will, but I am not going to take away any of his legal rights. . . ."

The matter at that time was temporarily abandoned but the following day the Court clarified its ruling. It at that time announced a relaxation of the general rules so as to permit appellant Duke to cross-examine witnesses, viz. [Tr. 40]:

"The Court: Now, that there be no confusion about the participation of Mr. Duke, I think I indicated in yesterday's session that Mr. Duke is either under an obligation to appear in pro per or to be represented by counsel, but that a hybrid of the two is something to which he does not have a right as a matter of right.

The cases to which I have had access since that matter was presented to me yesterday bear that out. It is the court's understanding that Mr. Fitzgerald will make all arguments of fact and the opening statement to the jury on behalf of Mr. Duke, and Mr. Duke's participation in the trial except as he will participate as a defendant and as a witness, if he so chooses, will be that he will be here as a defendant. He may be a witness, if he so elects, and the Court will permit him to participate in the cross-examination of witnesses or in the direct examination of witnesses to the extent that we will continue to recognize the rule that there shall be but one counsel for a side or party as to any one witness.

So if Mr. Duke undertakes to cross-examine a witness, Mr. Fitzgerald will not. If Mr. Fitzgerald undertakes to do the examining, Mr. Duke will not participate in it, as to that particular witness. . . .

. . . Now, in this case, if we get into argumentative examination of witnesses, the sort of thing that a defendant's natural interest in the case will tempt him to do, then I will not permit further examination of witnesses by Mr. Duke. As long as the examination conducted by Mr. Duke remains entirely an examination, free from argument, then Mr. Duke may participate in the examination to the extent the Court has indicated.

Are there any other matters we should take up before the jury comes in?

Mr. Duke: If it please the Court, for the record, may I note an exception to the court's ruling to the extent that I cannot make an opening statement on my own behalf?"

* * * * * * * *

"The Court: . . . I understand you want to make an opening statement, you want to argue the case.

Mr. Duke: No, I do not want to argue the case, your Honor.

The Court: You can't make an opening statement, either.

Mr. Duke: I only want to make an opening statement because I alone am prepared—

The Court: That is your misfortune, Mr. Duke. You have been under indictment here for months, and to come to court with only yourself prepared, knowing the law or being trained to know it, is just something you are going to have to live with. Now, you get Mr. Fitzgerald educated as to the facts.

I know academically you are educated, Mr. Fitzgerald, but as to the facts, if you are not well prepared, *you proceed last and I will see there is ample recess so that Mr. Duke can write it out, if he wants.* [Emphasis added.]

But we are not going to have him stand before the jury and make the statement."

The foregoing rulings of the Court were correct. While an accused is entitled to assistance of counsel in a Federal criminal case or is entitled to appear *in propria persona* and conduct his own defense, the choice is in the alternative and not the cumulative. The accused must make his choice. The Federal authorities are clear in support of the proposition that one cannot both be represented by counsel and represent one's self simultaneously. Thus, in 28 U. S. C. A. Sec. 1654, it is provided:

> "In all courts of the United States the parties may plead and conduct their own cases personally *or by counsel,* as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein. As amended May 24, 1949, C. 139, Section 91, 63 Stats. 103." [Emphasis added.]

That the above quoted section [1654] states the right in the alternative, has been established and the constitutionality of the statute upheld.

> *Shelton v. United States* (1953, 5th Cir.), 205 F. 2d 806.

In *United States v. Foster* (1949, D. C., S. D. N. Y.), 9 F. R. D. 367, Judge Medina stated, at 372:

> "In the Federal courts, where a defendant has no right to be heard both in person *and* by attorney, it would seem clear that the control of the proceedings by the court is no less extensive." [Emphasis theirs.]

A leading case on the subject is that of *United States v. Mitchell* (1943, 2nd Cir.), 137 F. 2d 1006 at 1010, wherein it is stated:

> "The cases cited by defendant stress equally, as indeed, they probably should, the right of an accused

> to act for himself and his right to have a lawyer assigned in his behalf [citing authority]. Obviously however, those rights cannot be both exercised at the same time."

Thus, it is clear that the trial court acted correctly in refusing to allow Duke to appear both through counsel and *in propria persona.* Without extensive discussion it may be said accused may not demand assistance by counsel which is free from all error for it is obviously true that in any lawsuit one good attorney must loose. All that may be demanded is that an attorney appear, advise, counsel and represent his client at all steps of the proceedings. If he does this and his mistakes are not such as to reduce the proceedings to farcical proportions the accused is accorded all due protection under the Sixth Amendment.

See:

Losieau v. United States (1949, 8th Cir.), 177 F. 2d 919;

United States v. Regan (1948, 7th Cir.), 166 F. 2d 976;

Moss v. Hunter (1948, 10th Cir.), 167 F. 2d 683;

Soulia v. O'Brien (1950), 94 Fed. Supp. 764;

Meritt v. Hunter (1948, 10th Cir.), 170 F. 2d 739;

United States v. Wight (1949, 2nd Cir.), 176 F. 2d 376 at 379;

Williams v. United States (1954, 4th Cir.), 218 F. 2d 276, 279-280;

Hayman v. United States (1953, 9th Cir.), 205 F. 2d 891, 894, and authority collected in Note 2, page 895;

United States ex rel. Thompson v. Dye (1952), 103 Fed. Supp. 776.

Appellant Duke takes the position that he was irreparably prejudiced by the rulings of the Court relative to his role in the trial. The existence of such prejudice is no where shown other than by its bare allegation and a considerable indulgence in supposition, conjecture and surmise. Appellant Duke supports this thesis by a diatribe, the gist of which is that he alone was sufficiently familiar with the facts and law of this case to give himself adequate representation; that realizing he would have to assume not only the role of the advocate but also that of the defendant—witness he sought to associate Mr. Fitzgerald to "help him over the rough spots," that Fitzgerald was not familiar with the facts or the law of this case and that by in effect compelling Duke to play a subordinate role to Fitzgerald, the Court permitted extraneous issues to seep into the case to Duke's prejudice. Specifically, appellant Duke alleges that it was through Fitzgerald's unfamiliarity with the case that the so-called "special defense" was interjected into the proceedings. This issue has become so inextricably intertwined throughout the various facets of the case, and is so relied upon by appellant Duke, that it warrants a somewhat extended discussion at this juncture.

Basically, the so-called "special defense" had its genesis in appellant Duke's allegations that his prosecution was the result of a plot or conspiracy by certain public officials in conjunction with organized labor, to frame him on these charges. It was made clear by the Court below that such a conspiracy, if in fact one did exist, could be considered as a reason for the adverse testimony of certain witnesses [Tr. 3207, 3208, 5089]. Although appellant Duke *now* alleges that his claim of "conspiracy" or "frame-up" was misinterpreted by Court and counsel with detrimental effect to his cause, when the skein of the development of this issue is traced throughout the proceedings below it becomes apparent that appellant Duke and not the Court or the prosecutor or Mr. Fitzgerald or Mr. Whelan was the responsible party.

The first mention of this alleged "conspiracy" occurred even before the trial below commenced, namely, at the time of appellant Duke's arraignment on a companion case. While not strictly a proceeding in the instant case, it is contained in appellant Duke's extensive appendix and as such may be considered by this Honorable Court as part of the record herein on the theory that it is a stipulation for an admission which is pertinent to the issues involved in this appeal.

United States v. Jones (1949, 9th Cir.), 176 F. 2d 278.

Thus, at page 12 of the appendix it appears that at his arraignment appellant Duke made the opening statement in what was to become known as his "special defense" when he stated:

> "I am convinced that I will be able to prove, and with a great degree of speed, that the charges are completely false, and for that reason I don't think the trial would be long.
>
> "I think it would be very short, and I think I will be able to show that certain individuals, labor leaders and their attorneys, in league with Customs officers, have entered into a conspiracy to, if I may say, if it please the Court, to obstruct justice themselves by procuring false evidence and having such evidence presented to the United States Grand Jury, so I would like, if it please the Court, to be able to show that and have this determined at the earliest possible moment."

Again at page 14 of his appendix, appellant Duke states:

> "However, I will state to the Court that I do think there is a matter of public concern here and that is as stated to the Court. I think that there is—I have clear proof, clear, unequivocal, undenied evidence that there has been conspiracy entered into by officers

of the court, attorneys in this community representing labor organization, and United States Attorneys, not only to procure false evidence to have me *indicted,* but also to commit murder.

"Before I went before the grand jury to testify myself, my life was threatened by these people, and I think, due to the interests of—"

Despite this unequivocal announcement, appellant Duke now maintains that this accusation of "frame-up" or "conspiracy" against him was something not of his own doing but something that was thrust upon his unwilling shoulders by the Court, the prosecutors, and his attorney, Mr. Fitzgerald. The facts belie any such assertion. The theory originated with appellant Duke, and was perpetrated and acquiesced in by appellant Duke. Under this theory appellant Duke was permitted to introduce much testimony, ordinarily inadmissible, to prove that he was the victim of a conspiracy to convict him upon perjured evidence. To illustrate, during the morning session of August 23, 1955, in the presence of appellant Duke the following colloquy took place without objection from him [Tr. 1955]:

"The Court: Well, going back to what the Court was asked to inquire of prospective jurors, when we were impaneling the jury, it was made abundantly clear to me that it was going to be claimed that this prosecution was part of a frame-up because of the displeasure which some union or union officials had with Mr. Duke, because of things he had done in the performance of his official duty as a Deputy District Attorney of San Diego County. Is that right, Mr. Fitzgerald?

Mr. Fitzgerald: That is right, your Honor.

The Court: All right. Now, if this case is a part of such a frame-up, I think the jury should know

it and any defendant who asserts that a prosecution of the type which has been put on here is not based upon true evidence, but is fabrication because of the animosity of union officials, apparently the contention is with connivance or, at least, knowledge of those prosecuting the case, would be a prosecution which should not be favored. In fact, there should be other prosecutions if people are brought before a jury on a criminal charge simply as an act of vengeance because of having offended some union official or officials.

If labor unions have reached that stage of strength or labor union officials are that corrupt, then we should certainly know it and there should be appropriate precautions.

Hence, it appears to the Court that door is always open to a defendant to show he has been framed. And this is what the defendant Duke is undertaking to do at the present moment, with the testimony of witness Buono.

Objection overruled."

Appellant Duke was present but he made no effort to correct what he now chooses to characterize as the "collateral tangent" the trial was taking.

In the afternoon session of September 2, 1955, in the presence of appellant Duke at the conclusion of a witness' testimony, the prosecutor moved to strike certain of the testimony. In denying the motion and allowing the testimony to remain, the Court stated:

"The Court: Well, suppose you did conspire to build up a false case against Mr. Duke, wouldn't he be entitled to prove it piecemeal, just as you prove your conspiracy piecemeal?

Would this perhaps not be one of the straws which, put together might develop into a real haystack?

In charges of conspiracy, whether it be a conspiracy committed by the defendant or a conspiracy to wrongfully prosecute a defendant by overzealous law enforcement officers, a very wide latitude must be allowed and the conspiratorial situation is developed, if it exists, not by any one bold striking piece of evidence, but by introduction of what you might call straws, which cumulatively combine to produce a mass of evidence pointing toward one or the other theories.

I deny the motion. It is relevant evidence."

Again appellant Duke was present and again he made no effort to correct what he now claims is an erroneous conception of his defensive theory.

But we are not left to rely merely upon appellant Duke's silence to establish the impression of tacit acquiescence. The Court specifically framed the various theories of defense and appellant Duke expressly agreed with the synopses given by the Court. This occurred in the presence of appellant Duke during the morning session of September 2, 1955. An objection was interposed by the prosecutor to a question which plainly called for a hearsay answer. The Court stated [Tr. 2306]:

"The Court: The Court understands and I can see your objection, because ordinarily these questions are impeachment questions. By that I mean, members of the jury, these situations usually arise when some witness has denied a particular conversation, that is, has denied saying a particular thing or has said that a particular thing was said.

So counsel always, if they follow the law very meticulously, ask the witness, 'Did you not at a certain time and place' say whatever it was using the substance of the words, and sometimes the exact words are 'Did you not say the same thing.'

Then the witness, having been confronted with the alleged conversation, either admits or denies it. If he admits it, that is the end of it, so far as evidence is concerned.

If he denies it, then at a later time the questioner decides to ask that question having laid the foundation by having had a witness say, 'No, I did not say certain things' he calls someone who claims to have heard the conversation, in the same substance and effect, that is, the same words are stated to the witness, and 'Did Sankary' or whoever it was, 'at such a time and place say that?'

Well, you can see that in situations such as this, not having had Mr. Sankary, we are not in a position to hear evidence undertaking to show that Sankary said something which Sankary has denied saying.

As I understand the defense in this case, first of all, primarily, it is the defense 'We didn't do what these prosecution witnesses have said we did. But the reason those witnesses came forth and told what, to our defense contention is a trumped up story against us, is that a certain group of persons, Sankary, Hannah, Vader, Steward, some labor unions operating in this county, the Customs Service, the United States Attorney's office'—I don't know if I have enumerated them all—'have combined together' —and I think Judge Solomon—'to induce these witnesses, who have testified for the government, to tell a false story or series of false stories in order to wreck the private vengeance of Vader, Sankary, Steward, and so on, against these particular defendants.'

Now, I don't think it is claimed that Judge Solomon was personally out to get these particular defendants, but Judge Solomon is said to be going along with the plan and scheme, and the labor unions,

Mr. Sankary, Mr. Steward, Mr. Vader, who are out to establish a trumped up false case against these defendants.

Now, when an objection is made to the giving of testimony, that someone has heard a conversation, in which someone of the accused persons allegedly said something, I think the objection must fail when the defense is as pointedly toward the fabrication of the case as we have been told it is in this case.

Now, is that right, Mr. Duke?

Mr. Duke: *That is our defense, your Honor. That is my defense.* However, I think your Honor has included persons in your enumeration of people, that were a part of the scheme, that I do not contend that were a part of it.

The Court: I am sorry, sir, then, because if you establish, indeed, a nefarious scheme, I wouldn't want to identify anyone with even the charge whom you don't contend was with it.

But I am trying to recall, as best I can without transcript here, what from memory or who from memory had been named as the parties to it.

Suppose you tell us, Mr. Duke, who the parties to this scheme are alleged to be.

Mr. Duke: Your Honor, I have mentioned no names myself. It is Mr. Hadzima, your Honor recalls who made the charge and mentioned the names.

The Court: Mr. Hadzima didn't charge that anyone had told him to testify falsely. He said he was testifying to the truth.

Mr. Duke: Your Honor, he testified that he gave a recording we put in evidence—

The Court: That recording was an impeachment matter only. Now, just tell me who these parties are who have put Hadzima, Spicuzza, Todd, and so forth, up to telling a false story against you. If you

will name them, then we will understand just who the alleged conspirators are against you, and I will be better guided in ruling as to admissibility of whose statements at one place and another, the statements not being impeaching, but the statements being admissible because they are evidence in some degree or other, either direct or circumstantial evidence of the scheme. So tell us who they are, please. . . .

Mr. Duke: I don't know all of the persons, your Honor. I have stated heretofore, I believe, that Mr. Sankary, certain labor officials in this community, some of whom I prosecuted myself once, Mr. Vader and Mr. Hadzima.

The Court: Do you contend that Wanda Sankary is in on it?

Mr. Duke: I would say and Mrs. Sankary. And these people I have just named, your Honor, I have contended, and I rely on the evidence that has been adduced so far, that other persons have either inadvertently or purposefully assisted in this scheme.

I don't know. I am going to be charitable with the United States Attorney's office and say that they were hoodwinked, and that is the position I will take at this time.

The Court: Hoodwinked or not, are you contending they are a party to it? We are repeatedly getting objections to testimony, which would ordinarily not be admissible. That is, what someone said on some courthouse steps or while they were having coffee somewhere, and that ordinarily would not be admissible. But, in the light of this particular defense, it is admissible, if they are alleged to be parties to the scheme.

Now, I don't want to talk you into enlarging your circle of alleged conspirators here, but I would like to know whether you just take the attitude that the

United States Attorney is a pawn in the thing and didn't know what they were doing. If so, we will have to stand by the hearsay rule so far as statements by their assistants are concerned.

But if they were parties to it, we should know it so I can be guided in my rulings. If you say they are parties to it, I will have to let you tell what Mr. Steward said when he was out fishing, if you offer it.

Mr. Duke: Your Honor, being an attorney myself, I do not like to make such charges against other attorneys. I am very reluctant to do that.

As I have stated before, Mr. Stewart, and I believe stated to the Federal Bureau of Investigation, that Mr. Stewart in my opinion, has been misled and I am going to take the position at this time, and I think I am taking a charitable position, that Mr. Stewart is still being misled.

The Court: Well, then, should we say he is a misled participant in the operation of the scheme?

Mr. Duke: Yes, sir.

The Court: I will admit then evidence of what he has said at other places."

Subsequently [Tr. 3212], the Court summarized the defense of the appellant Buono as being "We didn't do it." At page 3213 in the transcript the Court characterized the defense of the appellant Ballard as follows:

"The Court: Your defense, insofar as I have observed here, is a defense of alibi. 'I wasn't present at the time.'"

Following these characterizations at page 3214 the Court stated as follows in regard to the defense advanced by appellant Duke:

"The Court: So far as Mr. Duke's special defense, or, rather, explanation of the reason why so

many people have come here with stories which have a certain degree of harmony between them, although there are, some dissimilarities, you are on a watchful, waiting basis, not participating in the contention, but not disowning it, either, is that right?

Mr. Whelan: That is correct, your Honor.

The Court: All right.

Mr. Duke: Your Honor, may I say that my defense is 'I did not do it.' There is no conflict between Mr. Buono and myself in that respect.

The Court: I understand that. I hope the jury does. Mr. Duke says that he did not do these things, but the reason he is accused of doing it and the reason so many witnesses have been brought forth to say he did, is because of the concerted acts of Mr. Sankary, Mrs. Sankary, Mr. Hadzima, Mr. Vader, certain labor officials, and unwittingly the United States Attorney, and other persons to him unknown or as to whom his information is so meager he doesn't wish to assert their identity with the plan in the present state of the evidence.

Is that right, Mr. Duke?

Mr. Duke: That is correct. I would not mention anyone's name until I was sure myself."

See also Tr. 4296-4297. From the foregoing it is clear that throughout the trial appellant Duke consistently adhered to, and acquiesced in, this theory of "frame up," "conspiracy," or if you will, his "special defense." At his instance, and with his tacit approval the Court followed this theory and admitted evidence, otherwise inadmissible, for the purpose of proving that Duke was the victim of a frame up, or at least an attempt to convict him upon perjured evidence. It is only upon appeal that he seeks to disavow this theory by alleging that it was indulged by counsel and Court to his prejudice. Appel-

lant Duke now seeks to reconcile his present position with regard to this theory of defense at page 65 of his brief whereat he states:

> "The very most that can be said is that when called upon (and not before) Duke said Hadsamah was framing him, and based on what Hadsamah said, he believed Sankary and wife, Mr. Veder and some unnamed labor officials were participating. Duke expressed they took the position of the United States Attorney's Office, including Mr. Stewart, was being misled."

It was submitted that this is a distinction without a difference. It is further submitted that the "special defense" was relied upon by appellant Duke and repeatedly reiterated by him as his defense. He cannot disavow it now. In any event the net effect of appellant Duke's charge of frame up was to permit the admission of a mass of otherwise incompetent evidence on his behalf on the theory that in the aggregate it would reveal a conspiracy to convict him upon perjured evidence.

No matter what the San Diego newspapers may have "glared" (Duke Br. 57) the simple fact remains that this "special defense" was appellant Duke's creature and cannot be said to prejudice him.

The orders of the Court in denying Duke permission to appear *in propria persona* and by counsel simultaneously were correct and no prejudice resulted therefrom.

There Was No Prejudicial Misconduct on the Part of the Prosecutor.

Appellant Duke next alleges that prejudicial misconduct was committed by the prosecutor in four particulars, the first two of which occurred during the trial in the presence of the jury and the latter two of which occurred during the opening argument.

First: It is claimed that it was misconduct for the Government to call as a witness Morris Sankary (Duke's Br., 10, 37, 64). The supporting argument seems to be that Sankary was called "not to elicit any material evidence but solely for the purpose of informing the jury that Duke had subpoenaed Sankary and failed to call him as a witness." Appellant Duke cites *Milton v. United States* (1940, C. A. D. C.), 110 F. 2d 556, but fails to show in what way it is applicable to the example in point. *Milton, supra,* stands merely for the familiar principle that while failure of an accused to call a witness peculiarly within his power creates a presumption that the witness' testimony would have been unfavorable, where the witness is equally available to the Government and is, in a legal sense, a stranger to the accused, no such presumption arises. *Cf., United States v. Cotter* (1932, 2nd Cir.), 60 F. 2d 689, which indicates that the test may be which party knows the *facts* relative to the witness' proposed testimony. Under this view, on the basis of appellant Duke's statement that the United States Attorney was merely being misled but that Sankary was actually a conspirator, it is apparent that if any facts existed relative to Sankary's participation in any conspiracy to frame Duke, such facts were peculiarly known to Duke but not to the United States Attorney who, as an innocent dupe, could have had no knowledge of any nefarious scheme.

By reason of the repeated interjection of appellant Duke's so-called "special defense" *(supra),* which expressly accused Sankary of participation in a scheme to frame Duke, by the time Sankary was called to the stand by the Government he had assumed the status of the evil genius behind the alleged scheme against Duke. A brief review of the transcript reveals that prior to being called to the stand, his name had already come up in excess of 200 times during the proceedings. It was at this point that the Government called Sankary to the stand to dis-

pell some of the aura of mystery which had been cast about him. While appellant Duke chooses to assume that Sankary was called merely to impress upon the jury that Duke had failed to call him, no objection was made by Duke at the time, and the ground is raised initially on appeal. By his failure to interpose a timely objection, appellant Duke is precluded from raising this point on appeal. *(Payton v. United States* (1955, C. A., D. C.), 222 F. 2d 794, reversed in part on other grounds; *Mitchell v. United States* (1954, 8th Cir.), 208 F. 2d 854; *Isgate v. United States* (1949, 5th Cir.), 174 F. 2d 437.) Appellant acknowledges his failure to specifically object, but claims that the matter may be reviewed "in determining the cumulative effect of prejudice" (Duke Br. 12). As heretofore stated, there is no showing in what, if any, way appellant Duke was prejudiced beyond the normal give and take of trial tactics. *Milton v. United States* (1940, C. A., D. C.), 110 F. 2d 555, *supra,* cited by appellant Duke, gives him no comfort for in that case, as in the instant case, the defendant failed at the trial to object to the prosecutor's remark on his failure to call a witness. In this regard the Court stated, at page 558:

> "It was the duty of counsel for the accused, at once, to call any objectionable remarks to the court's attention; to request its intervention; and in the event of the court's failure to do so, then to note an exception. This they did not do. In fact, there is nothing in the record to indicate that, at the time of the colloquy, either counsel or court regarded the challenged statement as objectionable. Only by the broadest application of the principle declared in the Wilson case can it be said that the comment would have had any tendency to create in the minds of the jury a presumption against the accused from his failure to testify. The failure of counsel to call to the court's attention shows that the assignment of

error upon this point was an afterthought. Under the circumstances the objection came too late."

Citing *Diggs v. United States* (9 Cir.), 220 Fed. 545, 556, affirmed 242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502 Ann. Cas. 1168, as illustrative of the lengths of permissive argument. In the instant case, as in the *Milton* case, failure of appellant Duke to call to the Court's attention the alleged misconduct shows that the assignment of error upon this point was an afterthought. It is submitted that no prejudicial error is shown and none can be presumed.

Second: It is contended that the prosecutor committed prejudicial misconduct in his cross-examination of Duke by the following exchange [Tr. 2856]:

"[By Mr. Steward]: Isn't it also true in that conversation you were asked whether or not you knew these defendants of yours were smuggling birds? A. No, Mr. Steward, I wasn't asked that question.

Q. Didn't you reply in the presence of Mr. Sankary and Mr. Vader and Mr. Buono, 'I know they are smuggling birds. You know they are smuggling birds. If called to testify, I will get on the stand and lie about it?' No, Sir, I did not. And I will take a lie detector test, Sir.

Mr. Bowler: I move to strike that.

The Court: Mr. Duke, I have continually asked you not to make comments. You keep on making them.

The Witness: I am sorry, your Honor.

The Court: Stop being sorry and stop making the comments. If you make any more you are going to be punished for contempt."

It is appellant Duke's claim that the question objected to here was an attempted impeachment and was not followed up and this was a deliberate attempt by the prosecutor to put otherwise incompetent evidence before the jury. Appellant Duke's conclusions as to the motives of the prosecutor in propounding the complained of question, are pure surmise. An affirmative answer to the question would have shown knowledge of the bird smuggling ring, thus going to the heart of the conspiracy charges here. However, this question need never be reached by this Honorable Court since, as in the prior misconduct ground *(supra)* the question was not preserved for appeal by a timely objection (Duke Br. 12). Nor in fact did the prosecutor commit misconduct during the course of the trial. One of the outstanding features of the Anglo-Saxon Juridical System is the independent role allowed counsel on trial. It is there the privilege and duty of an attorney to vigorously prosecute his cause within all fair bounds. It is not desirable to hold too tight a rein on counsel's presentation and since, during the heat of argument in the court room, many things are said and done which seem somewhat short of desirability when reviewed in the calm of an appellate court, it is generally conceded that the conduct of counsel in the trial of the case is a matter normally left to the regulation of the trial judge who has unequalled opportunity to see and evaluate the impact of counsel's conduct in the forum. In this field the trial court's discretion is nigh absolute, and absent a palpable abuse, will not be reviewed by an appellate court. *(Iva Ikuko Toguri d'Aquino v. United States* (1951, 9th Cir.), 192 F. 2d 338, reh. den. 203 F. 2d 390, reh. den. 73 S. Ct. 786, 345 U. S. 931, 97 L. Ed. 1361, cert. den. 72 S Ct. 772, 343 U. S. 935, 97 L. Ed. 1343, reh. den. 72 S Ct. 1053, 343 U. S. 958, 96 L. Ed. 1358; see also, *Pogy v. United States* (1938, 6th Cir.), 96 F. 2d 734, cert. den. 59 S. Ct. 68, 305 U. S. 608, 83 L. Ed. 387.)

The foregoing is true not only of general conduct of counsel but it applies equally to arguments and other phases of the case. Thus whether a line of questioning permitted by the trial court constitutes reversible error, is a question for the Court of Appeals, based upon the entire record. *(Morgan v. United States* (1938), 98 F. 2d 473, and cases cited at page 477.) Accordingly, not every error or instance of misconduct committed by a prosecutor is considered to be reversible error. Particularly, over the course of an extended trial such as the instant case, error of greater or lesser form is almost certain to be insinuated into the record in some manner or other. To reverse in each such case, absent clear uncontroverted showing of prejudice, would be to render impotent the criminal judiciary. Of particular applicability in this connection is the language of the Second Circuit in *United States v. Hiss* (1950, 2nd Cir.), 185 F. 2d 822, cert. den. 71 S. Ct. 532, 340 U. S. 948, 95 L. Ed. 683, viz:

> "Where a prosecutor is charged with conduct so prejudicial as to amount to reversible error, the charge should be made good by showing a successful effort to influence the jury against the defendant by some means clearly indefensible as a matter of law. It is not enough if there are no more than minor lapses throughout a long trial. United States v. Socony Vacuum Oil Co., 310 U. S. 150, 239-240, 60 S. Ct. 811, 84 L. Ed. 1129. Cf., United States v. Buckner, 2 Cir., 108 F. 2d 921, 928, cert. den. 309 U. S. 669, 60 S. Ct. 613, 84 L. Ed. 1016."

While in the instant case there is a bare allegation of prejudice resulting from the prosecutor's conduct, such allegation falls far short of the requisite showing of a successful effort to influence the jury against the defendant.

Third, the third and fourth instances of misconduct purportedly occurred by reason of certain remarks of the prosecutor during opening argument. The third instance assigned is that portion of the argument in which the prosecutor stated [Tr. 4433]:

> "Mr. Ballard, with respect to Desert Center, says 'I wasn't there.' The inference on both defenses, of course, is that the government witnesses were mistaken or that they for some reason, did not tell the truth.
>
> The same cannot be said by Duke. Duke says, starting with myself, if you please, as a U. S. Attorney, going to a former Assistant U. S. Attorney—I misquote myself Assistant U. S. Attorney—Mr. Vader, Chief Customs Agent of San Diego, and various and sundry labor people are permeated with fraud.
>
> I resent it, and I have resented it right along, but there was nothing I could do about it. There is now, though.
>
> He made those accusations and didn't put any evidence on of any competent proof.
>
> Just threw it out, 'there is a bunch of them in on it, conspiracy, he says.' Maligning people on rumor or on hearsay, speculation; no proof whatsoever.
>
> He pointed the accusation at Mr. Vader of wrongful misconduct, of framing evidence, of bringing in perjured evidence. Mr. Vader is right here. Mr. Vader was on that stand and he did not ask one single question of Mr. Vader pertaining to that point. I was on there twice, mind you, not a word; not a word. He was afraid to ask us.
>
> How about that other one, Mr. Sankary, who occupied the same job I have? He conducted the case back in the year 1953 and left the office at that time. No further contact with the office. But another arch-

conspirator. Duke had him under subpoena before this trial started, mind you, and never called him, not once, so I called him. I put him on the stand and I asked him a little background information so you would know for sure it was the same fellow.

'Your witness, Mr. Duke.' What did he say? 'Did you have a telephone conversation with Judge Solomon on March 28th?' 'Yes.' Had he talked with Steward since that time? 'Yes.'

No further questions. He didn't ask that man a question, so I started to, to give you a true picture, and I was very properly stopped, because, ladies and gentlemen, so the Court says, it would make no difference if they were fighting a duel the entire year of 1953.

What sort of a government does Duke think we have here, that people go around deliberately framing people. Mr. Bowler's name has been brought into this, and why I don't know. What sort of corrupt organization must he think we have?

We have the Customs Service; corrupt, framing evidence. The United States Attorney's office participating in it, and citizens in San Diego participating in it. And it must have been somehow with the collusion of the grand jury.

It is absolutely the lowest attack I have ever seen or even heard of, because there has been no evidence, and he knew there was no evidence. Let's just take a couple of instances.

The Court: I don't think you should labor that, Mr. Steward.

Mr. Steward: Very good.

The Court: If there was no evidence, don't talk about it.

Mr. Steward: I won't, your Honor.

The Court: Argue the evidence we do have."

Any damage done by this argument (and we admit of none being done) was cured by the Court's admonition at the close of the argument. However, it is submitted that such a comment was invited by the comment of appellant Duke throughout the trial (see discussion of Duke's "special defense," *supra*). Indeed, the trial judge specifically so commented when appellant Duke sought to have him cite the prosecutor for misconduct, viz. [Tr. 4467-4468]:

> "Mr. Duke: It was well in mind, your Honor, but for the closing remarks of the prosecutor yesterday, which, as I stated yesterday, I thought were highly improper because—
>
> The Court: I think you invited those, Mr. Duke, throughout this trial. You have, by innuendo and by suggestions and by offers, suggested the matter so that there was an invitation. I don't think Mr. Steward should have accepted the invitation yesterday. He should have waited until closing and see if you brought it out in rebuttal. But there was nothing prejudicial or which would amount to misconduct in it."

It is clearly established in the Federal courts that a prosecutor's argument to be reversible must not only have been plainly unwarranted, but also clearly injurious.

Mellor v. United States (1946), 160 F. 2d 757;

See also:

Bratcher v. United States (1945), 149 F. 2d 742;

Weiss v. United States (1941), 122 F. 2d 675;

Pietch v. United States (1940), 110 F. 2d 817, cert. den. 60 S. Ct. 1100, 310 U. S. 648, 84 L. Ed. 1414.

Neither element is present here. There was no misconduct in this respect.

Fourth: It is alleged that the prosecutor committed misconduct by expressing personal belief in appellant Duke's guilt (Duke's Br. 66). Apparently, it is claimed that the prosecutor said "that Duke participated in the bird smuggling venture and the grand jury indicted him for doing that" [appellant cites Tr. 4444, but apparently means Tr. 4445, lines 5 to 10]. The remarks were merely passing reference and cannot be said to be sufficiently called to the attention of the trial court by the fragmentary assignment [Tr. 4467]. Additionally, it is the position of appellee that such remarks are in no way prejudicial nor do they constitute misconduct.

It is submitted by appellee that in view of the premises no misconduct, prejudicial or otherwise, was committed by the prosecutor in any of the particulars assigned by appellant Duke.

There Was No Error Committed by the Court in Commenting on the Evidence While Charging the Jury.

Appellant Duke contends that the Court committed error in commenting on Duke's so-called special defense while charging the jury. No argument is advanced in support of this contention, said appellant merely posing the bare question "for what reason should the jury 'consider the accusation' the court having ruled that there was no affirmative evidence to support it?" It is evident that this contention has its genesis in appellant Duke's claim that his prosecution was the result of a conspiracy to "frame" him. This is the so-called "special defense" which has heretofore been discussed at greater length (*supra*).

The initiating factor in this contention occurred at the close of testimony when the Court entertained motions by various counsel. At this time the Government moved to strike certain testimony on the ground that while it had been admitted to prove a conspiracy to convict Duke

by perjured testimony, the evidence as a whole failed to show any "frame up" or conspiracy for this purpose [Tr. 4224, *et seq.*]. Following some argument, the following colloquy took place [Tr. 4245-4246]:

"The Court: Of course, that evidence was received here at the time when there had been a great furor about the defense was going to prove there was a frame up, and that this evidence against the defendant was perjurious and had been procured as a result of the frame up, and they were going to connect the labor headquarters to it; in fact, connect Mr. Vader to it and Mr. Sankary and so on.

When it finally developed, it turned out to not be spelled out at all. However, it is in, the jury has heard it.

How can we erase it from their minds? Even if I strike it now, as a technical matter, how can I erase it from the jury's minds? They have heard a lot of smoke screen here.

Mr. Bowler: We won't ask you to erase it. Strike the evidence. It will prevent them from arguing; that is a point.

There is no use confusing the jury more on the situation. We would be satisfied if it were just stricken from the record. Counsel will know.

It seems to me, if it is hearsay, it is hearsay, and it shouldn't be in there, your Honor. If your Honor was misled in admitting it, if that same proposition was presented to your Honor right at this point, I am sure your Honor would sustain the objection to it. I don't think there would be any question about it.

I still think it is a question for the court on admissibiilty of evidence. It is hearsay of the rankest kind. It shouldn't be in that record.

The Court: Motion granted."

Additional argument was then entertained which showed that the testimony which was the subject of the motion to strike, was so intertwined with other valid testimony that attempts to strike the objectionable testimony *en toto* might give rise to substantial questions on review [Tr. 4247-4271]. Ultimately, the practical solution adopted by the trial court was to reinstate the stricken testimony but reserve the right to comment upon it. Thus it appears, at page 4272, *et seq.,* of the transcript:

> "Mr. Bowler: . . . I know your Honor would never have admitted that kind of evidence unless those statements have been made. And there has been no proof of any conspiracy or frame up involving any union officials or the United States Attorneys or the Customs Bureau.
>
> Mr. Fitzgerald: If the Court please, counsel now criticizes us on that, and yet he was the one that made the objection when proof was offered to show a conspiracy on the part of some labor unions.
>
> The Court: Well, I heard an awfully long offer of proof and it didn't prove anything which had any bearing upon this case.
>
> * * * * * * * *
>
> The Court: I assumed when it started out your gentlemen knew where you were going, and that you were going to develop the skeleton of the defense which had been suggested.
>
> But after we had gotten into it a little way, then I stopped having the jury here and heard that last witness—I forget his name now—out of the hearing of the jury, to determine whether there would be enough that, assuming every word of it were true, there would be a proof of a frame up.
>
> And you haven't even a suggestion of a frame up, as a matter of law . . .

The Court: There is no testimony that he [appellant Duke] would be wrongfully indicted upon perjured testimony, and that perjured testimony would be produced against him here."

The Court then resolved the matter by stating, at page 4277 of the transcript:

"The Court: I should think, gentlemen, as a matter of practical justice, instead of these motions to strike, it would be better for you to invite the Court to comment upon the evidence of Hadzima, and let the evidence stay in.

Mr. Bowler: I was just thinking the same thing. That certainly would be a case where the evidence as it is in the record—a case to comment on to the jury, that the jury should only consider admissible evidence.

* * * * * * * *

Mr. Bowler: In view of the Court's remarks, we will withdraw our motion to strike the testimony of Buono the morning of August 7, 1955" [Tr. 4278].

* * * * * * * *

"The Court: Of course, I have granted the motion, but I revoke the ruling and reinstate the testimony of Buono.

Mr. Bowler: All right.

The Court: I warn you I am going to comment on the witness Hadzima, and not in any terms which will compliment him."

From the foregoing it is apparent that appellant Duke s not quite accurate in the assumption implicit in the ıropounded query that the Court had excluded from the :onsideration by the jury the testimony which related to ıis efforts to prove a conspiracy against him. While initi-ılly stricken, said testimony was ultimately allowed to

go to the jury with appropriate comment by the Court. All appellants were forewarned of the intention of the Court to so comment [Tr. 4277-4279], and raised no objections to the proposed procedure. Pursuant to this announced and unopposed intention, the Court stated in his charge as follows:

> "It has been said here by some of the counsel that certain of the Government witnesses have, in effect, conspired together to tell false stories.
>
> Now, if a man told a false account of things here, of course, the ultimate fact which would cause your rejection of it would be that he told a false account, regardless of whether it was something on his own account that caused him to do it, or whether it was conspiracy. But it has been strongly suggested to you by some of the counsel that certain of these witnesses did conspire together, and in that connection you should consider that accusation. Consider whether the situation of those witnesses was such that they would have the opportunity to do so. What access they had to each other and what lack of access they had to each other.
>
> Persons in the penitentiary are under some restraint and some degree of unavailability to others. Consider that fact. Consider also that, notwithstanding the unavailability generally, there are extents of availability. Try to analyze it and come to the decision as to whether you can believe all or any part of the testimony, and then if you find you can accept some or all of the testimony, measure that testimony to the language of the indictment and see whether it establishes the charges, or any of them, which have been made in that indictment." [Tr. 5089.]

It was only upon completion of the entire charge that the appellant Duke made known his objection to the

Court's comment, at which time he refused the proffer of any necessary amplification, viz.:

"The Court: Anything else?

Mr. Duke: Yes. Your Honor, I want, just for the record, to enter some exceptions, if it please the Court.

One would be to the Court's statement to the jury consider of the witnesses had any opportunity to get together.

The Court: If it is simply exception and not a request for amendment, state it as an exception. If you request amplification in some way, you can expand on it to whatever extent is necessary, though. If you are simply excepting to something, state it as an exception briefly.

Mr. Duke: I don't think that the matter should be commented upon at all. I except."

By this action appellant Duke withheld his objection from the attention of the Court until the charge was given, and only then did he make his exception known. By his silence and his refusal to accept amplification he precluded any correction (assuming, *arguendo,* any is necessary), and is thus in the position of attempting to raise initially on appeal an objection which was not timely called to the attention of the trial judge.

However, even if this Honorable Court holds that appellant Duke's above quoted exception sufficiently saved the question for review, the comment of the Court is patently proper under the prevailing rules in the federal courts which allow the trial judge to comment on the evidence when charging the jury.

One of the earliest cases supporting this rule is that of *Rucker v. Wheeler* (1888), 127 U. S. 85, wherein Mr. Justice Harlan stated at page 93:

> "It is no longer an open question that a judge of a court of the United States, in submitting a case to the jury, may, in his discretion, express his opinion upon the facts; and that 'when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury,' such expressions of opinion are not reviewable on writ of error. Vicksburg, etc., RR. v. Putnam, 118 U. S. 545, 553; St. Louis, etc., RR. v. Vickers, 122 U. S. 360; United States v. Reading RR., 123 U. S. 113, 114."

Perhaps the best known expression of this federal rule is that of Mr. Chief Justice Holmes in *Quercia v. United States* (1933), 289 U. S. 466, wherein he sets out, not only the privilege of the rule, but also its inherent limitations. At page 469 of the United States Report it is stated:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. Herron v. Southern Pacific Co., 283 U. S. 91, 95. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, but drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. Carver v. Jackson, 4 Pet. 1, 80; Vicksburg and Meridian RR. Co. v. Putnam, 118 U. S. 545, 553; United

States v. Philadelphia & Reading Co., 123 U. S. 113, 114; Capital Traction Co. v. Hof, 174 U. S. 1, 13, 14; Patton v. United States, 281 U. S. 276, 288. Sir Matthew Hale thus described the function of the trial Judge at common law: 'Herein he is able, in matters of law emerging upon the evidence, to direct them; and also, in matters of fact to give them a great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies, and by showing them his opinion even in matters of fact; which is a great advantage and light to laymen.' Hale, History of the Common Law, 291, 292. Under the federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the Common Law are maintained in the federal courts. Vicksburg and Meridian RR. Co. v. Putnam, *supra;* St. Louis, I. M. & S. Ry. Co. v. Vickers, 122 U. S. 360, 363; Slocum v New York Life Insurance Co., 228 U. S. 364, 397; Herron v. Southern Pacific Co., *supra;* Gasoline Products Co. v. Champlin Co., 283 U. S. 494, 498.

"This privilege of comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguard against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This court has accordingly emphasized the duty of the trial judge to use great

care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided.'"

In *Minner v. United States* (1932, 10th Cir.), 57 F. 2d 506, the Court, in holding that the trial judge had abused his right of comment, Court stated, at page 513:

> "In so holding we do not intend to limit the right of a trial judge to properly sum up the facts and express his opinion thereon. To do so is not only his right but, in many cases, his duty. As said by the court in Rudd v. United States (C. C. A. 8), 173 Fed. 912, 914: 'A judge should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit should see that justice is done.' But in summing up and commenting on the evidence, the trial judge should be governed by certain well recognized limitations inherent in the very nature of the judicial office. He should state the evidence fairly and accurately, both that which is favorable and that which is unfavorable to the accused. His statements should not be argumentative, but impartial, dispassionate, and judicial; and they should be so carefully guarded that the jurors are left free to exercise their independent judgment upon the facts."

See also the following cases of this and other Circuits applying the above-stated rule:

> *United States v. Rosenberg* (1952, 2nd Cir.), 195 F. 2d 583, cert. den. 73 S. Ct. 20, 21, 344 U. S. 838, 97 L. Ed. 652, reh. den. 73 S. Ct. 134, 180, 344 U. S. 889, 87 L. Ed. 687;

United States v. Aaron (1951, 2nd Cir.), 190 F. 2d 144, cert. den. 72 S. Ct. 50, 342 U. S. 827, 96 L. Ed. 626;

Lovely v. United States (1949, 4th Cir.), 175 F. 2d 312, cert. den. 70 S. Ct. 38, 338 U. S. 834, 94 L. E. .....;

Myers v. United States (1949, 8th Cir.), 174 F. 2d 329, cert. den. 70 S. Ct. 91, 338 U. S. 849, 94 L. Ed. .....;

Fredrick v. United States (1947, 9th Cir.), 163 F. 2d 536;

United States v. Stoehr (1951, D. C. Pa.), 100 Fed. Supp. 143, and authority contained in Notes 17, 18 and 19, pages 152, 153, affd. 196 F. 2d 276, cert. den. 73 S. Ct. 28, 344 U. S. 826, 97 L. Ed. 643.

From the above-cited cases it is clear that it is only where the Court abuses its right to comment on the evidence that an Appellate Court will consider a reversal on this ground. As examples, the following comments have been held to constitute reversible error.

In the *Quercia* case, *supra,* the following comment was made by the court:

> "And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie. . . .

"Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty."

In *Wheatley v. United States* (1946, 4th Cir.), 159 F. 2d 599, the Court in charging the jury stated:

"Now, you have heard the testimony here of this defendant as to the situation in the place where he said he was gambling and drinking, and you heard the proprietor of the place say there was no gambling there, no drinks sold there at all. The old man said he was drunk, drinking wine, doesn't know what happened. Bear in mind that he did take money out of his pocket and pay the toll keeper at the bridge the toll. He knew what it was and gave him the toll, and when he succeeded in having this Denzil Wilson take him where he wanted to go, he threw a quarter on the cushion to pay the toll back into West Virginia. Was he so drunk he didn't know what he was doing? If he was, how did he know what the toll was going over there, if he was so drunk he didn't know what he was doing, how did he know to throw a quarter in there to pay the toll back?

"Now, gentlemen, I could go on—I am very much interested in this case—but I don't think it is necessary with gentlemen like you to consume more of your time and mine. If you believe this defendant, at the point of a knife sticking in the side of the driver of the car, forced him to take him across the river and to his home, the minute he crossed the river he was guilty of violating this Lindberg statute, 18 U. S. C. A. 408(a), *et seq.*"

Considered in the light of the foregoing authorities the exceedingly moderate comment of the trial court can in no way be construed as either harmless or plain error

(18 U. S. C. A. Rule 52). This portion of the charge served not only the purpose of calling to the attention of the jury the defensive theory urged throughout the proceeding below by appellant Duke, but also of further directing the attention of the jury in their deliberations to the possibility of collusion between the Government's witnesses. It is to be noted that when particularizing the opportunities for such collusion the Court was careful to point out that while there is some general restraint on mutual availability in penal institutions (where some of these witnesses were held) the possibility of such opportunities existing was not to be precluded. Additionally, the Court scrupulously instructed the jury that comments of the Court were not to be considered by them in the exercise of their prerogatives as the sole trier of fact. At page 653 of the transcript the following interim instruction was given:

> "The Court: From time to time I give you these little interim lectures on the law so final instructions will not be too unduly extended and burdensome. But you should never get the idea that by telling you one of these things that the Judge is pulling for or against one side or the other. I sit here impartially, insofar as jury cases go. I never undertake to indicate to the jury a feeling that one side or the other is prevailing."
>
> * * * * * * * *
>
> "I did not mean to say that the evidence does or does not point one way or the other in that regard. That is the question for you. But it is my duty to tell you the law and when I tell you the law is a certain way it doesn't mean that I am undertaking to influence your decision. . . .

There is only one person in the Court who has a right to decide these questions of guilt or innocence and that is a collective person which is made up of the twelve who constitute the jury, regardless of what the judge might feel. It is the jury that decides the case. What the judge feels is not to be taken by the jury—in other words, it isn't that I sit here talking about the case to you, and you simply reflect it back and make it official. You are not the censor of my feelings, because so far I haven't permitted myself to come to any decision on any matters except certain little interim matters. But on the big questions in the case I haven't permitted myself to come to a decision, and you should not interpret any of my acts as indicating that I have come to a decision; then you should bear in mind at all times that it is your responsibility and not mine."

At the commencement of the charge to the jury itself, the Court again admonished the jury as to the status of his comments on the evidence when he stated, at page 5055 of the transcript:

"It has been my duty to rule on admissibility of evidence, and that has been guided by legal standards, but I have no right to decide the facts. The law allows a federal judge to comment on the facts. If I should do that you must bear in mind that it is only comment, because the law also provides that the jury shall be the sole and exclusive judge of the facts, which means that, even if you think the judge has an opinion about any fact issue in the case, you are not to just sit there and reflect the opinion of the judge because, so far as the facts are concerned, you are the judge.

That is said to you collectively because it means that twelve of you are the judge. Yet it means that

every juror must agree with the verdicts which are returned, because all the parties to the lawsuit in the judicial system itself are entitled to have the individual opinion of each juror. But until those individual opinions are unanimous among the jury, they do not justify a verdict.

No court in the land can ever decide the facts differently than the way the jury decides them. If, for instance, a case goes up to the Supreme Court, the Supreme Court will decide the questions of law, but it never decides that a jury was wrong on matters where the facts are in dispute, because of all questions of decisions on facts which are in dispute have to be by the jury."

By these instructions the Court guarded the right of the jurors to exercise their free and independent judgment upon the facts.

Appellant Duke has failed beyond the bare allegation of impropriety to specify in what way the comment of the Court was allegedly improper or constituted error. Such a failure is in violation of Rule 18(2)(d) and (e) of this Honorable Court (Rules of the United States Court of Appeals for the Ninth Circuit 18(2)(d) and (e)). However, in any event, it is submitted that, read in its entirety, the complained of portion of the charge was, in the light of the foregoing authorities, fair, moderate and permissive comment, without prejudice to appellant Duke, and can in no way be held to be error.

There Was No Error Committed by the Court in Refusing to Admit Evidence Bearing on the Motive of Witness Hadzima and Based Upon Collateral Matters Related in a Certain Telephone Conversation.

An attempt was made by appellant Duke during the trial to put in evidence the contents of a certain telephone conversation. A recording had allegedly been made of this conversation which transpired on August 7, 1955 (during the progress of the trial), between appellant Duke and Buono on one end and a government witness, John Hadzima, on the other. The recording (made by appellant Duke) was introduced into evidence and is set out at various places in the transcript [Tr. 2048-2098, 2107-2156]. The conversation was, on the whole, relatively unintelligible, consisting largely of veiled statements, hints, and innuendo. Appellant Duke is of the opinion that it proved or tended to prove the existence of an illegal conspiracy to convict him. At best, it was a recitation of opinions and conclusions both of fact and law, of the witness Hadzima. The Court in admitting the recording indicated that it was received solely for the limited purpose of impeaching Hadzima and the jury was so instructed [Tr. 2037, 2038, 2041, 2044, 2098, 2099, 2657, 4291, 5100 and 5101].

In cross-examining the witness Hadzima prior to the time the recording of the telephone conversation was produced, appellant Duke questioned him about statements he had allegedly made in the said telephone conversation. Upon objection the Court ruled that the question was improper for cross-examination and indicated that the correct procedure would be to produce the recorded conversation during the development of the defendant's case and not initially upon cross-examination, viz. [Tr. 957]:

> "The Court: I think if there were conversations in which a witness, a prospective witness, in substance, said to a defendant, that he, the witness, was

a party to a frame-up on that defendant, then it is for the defendant to offer that affirmatively as his defense and if the witness is able to rebut it, he should be called in rebuttal.

But it should not be introduced for the first time in cross-examination of the witness who has not referred at all in his direct testimony to the conversation.

Mr. Duke: Your Honor would suggest I desist from that line of questioning about the telephone conversation then?

The Court: Yes.

Mr. Duke: Thank you, your Honor. I may say here, for the benefit of—

The Court: If there was such a conversation it is for you to bring forth as part of your case."

Appellant Duke interprets the above quoted language as an order on the part of the Court to prove the subject matter of the conversation affirmatively as a defense. It is submitted that the above quoted statement of the Court cannot logically be tortured into an order to appellant Duke to do anything other than to desist from the line of incompetent questioning he was then endeavoring to pursue. Certainly, the statement cannot be perverted into any kind of a representation that if propounded during the defense the questions would automatically be allowed. The Court's statement is limited to suggestion that since such questions are improper on cross-examination, they must be propounded if at all during the defendant's case. The remarks go solely to the propriety of the time the questions were asked. They in no way pretend to decide the sufficiency, competency, materiality, or relevancy of the questions. Such matters were to be considered only when the questions were asked. The ruling could not properly be anticipated. Appellant Duke

was not promised automatic admissibility on the subject of his questions.

While it is true that showing bias of a witness is an accepted mode of impeachment, the attempted proof in this case was based upon a recording admitted for a limited purpose (impeachment). The offers of proof show in effect an attempt to introduce collateral matters rather than to affirmatively show a legitimate manifestation of bias upon the part of Hadzima. No error was committed in this particular.

There Was No Error Committed by the Court in Refusing to Admit Evidence Tending to Prove That During a Specific Period Appellant Duke Was Heavily in Debt and Had to Borrow Funds From the Bank to Meet Current Expenses.

In his third specification of error, appellant Duke specifies the ruling of the Court in refusing to admit the testimony of Duke's former law associate to the effect that during a specified period Duke was heavily in debt and had to borrow funds from the bank to meet current operating expenses. This testimony was sought to be introduced to rebut the testimony of the witness Hadzima, that during the same period he had delivered to Duke "fabulous sums of money" (Duke Br. 35) receipt of which Duke had denied. Although contained in the specification of error this ground is no where argued in the argument. Accordingly, it is not clear in what way appellant Duke contends that he was prejudiced by the error of such ruling if any (and we contend there was no error). Suffice to say the materiality of such a question is not readily apparent. A responsive answer to the question would, at best, be material to appellant Duke's allocation of funds rather than his acquisition of them. The trial court committed no error in excluding the proffered evidence.

There Was No Error Committed by the Court in Refusing to Permit Proof That Immediately Prior to the Trial a Government Witness Had Been Engaged in Illegal Operations for Which He Had Not Been Prosecuted.

Appellant Duke next contends (Duke Br. 71) that the trial court erred in refusing to permit him to prove that the witness Robert Helm was, immediately prior to trial, engaged in certain export activities which were claimed to be illegal under United States law by appellant Duke. Briefly, the evidence showed that within a day or two of the commencement of the trial witness Helm who was an aviator received a cargo of whiskey from a government Customs warehouse at San Diego. The whiskey had been stored in a bonded warehouse, that is, while physically present in the United States, it was in effect in a free zone no duty having been paid on it. It was Helm's intention, according to him, to fly the whiskey from San Diego, California, into Mexico for a Mexican company named Importadora de Sinaloa. Since the whiskey was taken from the bonded warehouse for the purpose of export no American duty was required. Appellant Duke sought to prove that Helm was in fact engaged in a smuggling transaction. In support of his theory he offered to prove that Helm had crashed his airplane just on the Mexican side of the border. This was admitted by Helm but his version of the story was that while flying the whiskey into Mexico for Sinaloa he had developed engine trouble and had crashed in a desolate area about three miles south of the border. Duke claims that Helm landed the whiskey at the locale of the crash, had unloaded it, and then crashed while taking off [Tr. 1322-1335]. It is Duke's claim that Helm was in fact engaged in illegal smuggling activity and that this activity was carried on with the knowledge, consent, and approbation of Chief Customs Inspector Rae Vader. Appellant Duke

therefore claims that he should have been permitted by independent proof to show this as bearing on the bias and motive of the witness Helm. The Court restricted the offer of such proof on the ground that it was collateral to the main case [Tr. 1332]. Specifically, the Court approved an objection of the prosecutor to the effect that appellant Duke must first prove Helm's activity to be an illegal smuggling activity before he could go into any collateral matters in connecion with the transaction [Tr. 1330]. It is submitted by appellee that whether Helm's activities constituted an illegal smuggling activity under the laws of Mexico is immaterial in the instant case. Appellant's argument can only have efficacy if a violation of the laws of the United States be made out and then only with the knowledge of a person who, in position to prosecute, wilfully and maliciously refuses to so do. Appellant cites *Farkas v. United States* (1922, 6th Cir.), 2 F. 2d 644, which merely holds that the state of mind of a witness as to hope or belief that he will secure immunity or a lighter sentence or other favorable treatment in return for his testimony, is proper evidence tending to show the existence of such hope or belief. Appellant attempted examination of witness Helm on purely collateral issues. They went not merely to his state of mind as in the *Farkas* case (*supra*) but attempted to show acts of misconduct unrelated to the instant case. In this respect, this Honorable Court has long since applied the well-known rule which it has quoted with approval from 1 Greenleaf (16th Ed.), Section 461(a):

> "It has long been settled the testimony from other witnesses of particular instances of misconduct is an improper mode of discrediting because of the confusion of issues and waste of time that would thus be involved, and because of the unfair surprise to the witness, who cannot know what variety of

false charges may be specified and cannot be prepared to expose their falsity. This rule excluding proof by other witnesses is well settled and everywhere accepted."

McCune v. United States (1924, 9th Cir.), 296 Fed. 480, 481; citing also Jones on Evidence, Sec. 840;

Daniels v. United States, 196 Fed. 459;

Bullard v. United States, 245 Fed. 837;

Fisk v. United States, 279 Fed. 12.

See also:

Hanover Fire Insurance Co. v. Dallavo (1921, 6th Cir.), 274 Fed. 258, 266.

Here too, the possibility of confusion by introduction of the collateral issues more than outweighed any importance such evidence might have had as to proving bias on behalf of witness Helm. The Court committed no error in this respect.

There Was No Error Committed by the Court in Permitting Hadzima to Have the Advice of Private Counsel While Testifying.

The next ground alleged as error by appellant Duke is that the Court committed error in permitting John Hadzima to confer with his private counsel Harold Lasher while he was testifying in the instant case (Duke Br. 73, 74). Specifically, appellant Duke objects to the fact that when asked by Duke on cross-examination a question concerning his finances during the years 1953 and 1954, Hadzima on advice of counsel refused to answer the question. Additionally, Duke points out that when Hadzima was being cross-examined by Mr. Whelan on behalf of appellant Ballard, Mr. Lasher conferred with Hadzima

as a result of which Hadzima stated he wished to correct a previous statement given in answer to a prior question.

While it may be conceded that a witness has no absolute right to aid of counsel when testifying at a trial, the authorities no where prohibit such representation if the Court acquiesce.

In re Black (1931, 2nd Cir.), 47 F. 2d 542, 543;

United States v. Blanton (1948, D. C. E. D. Mo.), 77 Fed. Supp. 812, 816-817.

It cannot therefore be said that the Court by the mere act of permitting counsel to advise a witness while testifying, *per se* prejudiced the appellants. Such prejudice, if any, must affiramtively be shown independently. A review of the record at the time witness Hadzima was being advised by attorney Lasher clearly shows no prejudice resultant to appellant Duke. While appellant Duke alleges that he objected to attorney Lasher's presence, it is apparent that the objection went to the fact that attorney Lasher was also under subpoena as a witness and would be present in violation of the Court's order excluding witnesses [Tr. 466, 467, 468]. The initial objection on behalf of defendant Duke which went to the propriety of Lasher's presence in the courtroom as counsel for Hadzima, did not occur until Mr. Fitzgerald objected at page 932 of the transcript.

Appellant Duke objects to the fact that while Hadzima was permitted upon his direct examination to testify that he had paid Duke sums of money in 1953 and 1954, an attempt by Duke on cross-examination to question Hadzima "with reference to his finances during the years 1953 and 1954" (Duke Br. 74) was objected to and the objection sustained. However, it is apparent from the transcript that Duke first asked the question "And would you tell me, what was the total amount you received

from any illegal enterprises in the year 1953?" [Tr. 931]. This question was not objected to and it is submitted inasmuch as Hadzima testified on his direct examination to having paid sums of money to Duke from illegal enterprises, that question is pertinent and correct. However, the following question asked by Duke is subject to an obvious vice, viz.: [Tr. 931], "by Mr. Duke: During the year 1953, *how much money did you make?*" A responsive answer to this question would go beyond the normal scope of the direct examination. The direct examination had been concerned not with the total amount of money earned by the witness Hadzima in any given year but the total amount earned by the witness Hadzima from illegal enterprises. An answer to the propounded question clearly hold the seeds of self-incrimination. Recognizing this Mr. Lasher asked to confer with his client [Tr. 932] and as a result Hadzima refused to answer the question on the ground that it might incriminate him [Tr. 932]. At that point the Court observed [Tr. 933]:

> "I think the vice of the question is, Mr. Duke, you asked him how much he made, calling for a *total income.* You started out directing your question to income from illegal smuggling transactions.
>
> "Possibly if you will revert to that line of questioning the privilege will not be claimed." [Emphasis added.]

Pursuant to the suggestion of the Court, appellant Duke next questioned witness Hadzima regarding the amount of money he had earned as a result of illegal importation of merchandise. When witness Hadzima attempted to invoke the Fifth Amendment grounds in support of his refusal to answer, the Court stated [Tr. 933]:

> "The Court can't recognize that, Mr. Hadzima, because you have gone so far in your testimony. You can't just open the door a little way, stick a hand

through and then refuse to come through the rest of the way. That is what you are, in effect, doing.

You have been on the witness stand now almost a day and a half of regular court hours, testifying largely in this area. I believe this question is proper cross-examination within an area that you have testified to freely, without interposing an objection, so you will have to answer this question."

At this point the Court made clear the limited role in which Hadzima's counsel, Mr. Lasher, was appearing. The following colloquy took place [Tr. 933-934]:

"Mr. Lasher: I wonder if I may make this statement, your Honor—

The Court: No, you are not participating in the trial of this case. You are advising a client.

The Court has ruled respecting the necessity of his answering this question."

Patently, the rulings of the Court in this connection were correct. While appellant Duke was free to cross-examine Hadzima in regard to the amount of money he had earned or paid to Duke as a result of illegal enterprises, a question going to his entire income for any set period possessed definite incriminatory aspects in that it could possibly form the basis of a future Internal Revenue prosecution.

Apellant Duke also takes exception to the fact that during the cross-examination on behalf of appellant Ballard, after conference with Mr. Lasher, witness Hadzima stated that he wished to correct an answer to a previous question. Duke claims "This was error. Defendants were entitled to have the testimony of the witness, not his counsel." (Duke Br. 74.) The complained of testimony occurred as follows. Witness Hadzima was asked [Tr. 888], "Were you told by anyone connected by the

government that the case pending against you now, where you, Pursselley and Ballard are jointly named as defendants, would be dismissed as far as you are concerned if you gave testimony in this case?" Answer, "No, sir." Subsequently, attorney Lasher conferred with witness Hadzima as a result of which witness Hadzima stated [Tr. 889]:

> "I wish to correct my statement, your Honor.
>
> The Court: What statement do you wish to correct?
>
> The Witness: What I just said. My attorney told me that I had assurance that I would not be prosecuted, that the case would be dropped.
>
> The Court: Did you know that?
>
> The Witness: Yes, he told me something to that effect yesterday.
>
> The Court: The case that still is pending?
>
> The Witness: The one that is pending.
>
> The Court: On which you have not been tried or sentenced?
>
> The Witness: Yes, your Honor."

From the foregoing testimony, it is apparent that appellant Duke is put in the position of objecting the very admission he was trying to elicit upon Hadzima's cross-examination, viz: an interest or motive which would show a bias on the part of the witness Hadzima. In this colloquy, the witness has admitted the basis of such a motive in that he has stated that he has been promised immunity. He further stated that he knew that. Thus, the inference could be drawn by the jury that Hadzima's testimony was colored by this knowledge. Evidently, despite that the jury believed his testimony. However, in any event the changed question redounded to appellant Duke's benefit. He was not prejudiced thereby and cannot complain. There was no error committed in this particular.

There Was No Error Committed by the Court in Refusing to Give the Requested Interim Instruction.

Appellant Duke's sixth specification of error (Duke's Br. 36) is that the Court erred in instructing the jury in refusing to give a requested interim instruction to the effect that if stronger evidence were available to prove a fact, failure of the government to produce such evidence would create an inference that such evidence would be unfavorable to them. This specification although raised as a specification was not argued in appellant Duke's argument. In any event he merely refers to pages of the transcript wherein said instruction may be found. This procedure is in violation of the provision of Rule 18(2)(d) of this Honorable Court which provides in pertinent part:

> "When error alleged is to the charge of the Court, the specification shall set out the part referred to *totidem verbis,* whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial. . . ."

This rule is not complied with.

However, it appears that the interim instruction requested is found at page 244 of the Clerk's Transcript and provides in material portion:

> "You are instructed that the defendant in a criminal case is never required to establish any fact which would entitle him to an acquittal but that at all times the burden of proof is upon the government to produce evidence which convinces you of a defendant's guilt beyond a reasonable doubt. Therefore, if you find that it was within the power of the government to produce stronger and more satisfactory evidence

to prove the fact and the government fails to produce such evidence then you are entitled to infer that such evidence if produced would be unfavorable to the government."

At page 5110 of the transcript the following colloquy took place in regard to the requested instruction:

"Mr: Duke: . . . I requested, I think we all three requested an interim instruction this morning. I wonder if your Honor had that instruction in mind. We do request that instruction.

The Court: Instructions were to have been offered long ago, and the clerk brought to my attention at 9:30 this morning one had just been filed.

Mr. Duke: This was raised in the argument, your Honor.

The Court: I think I have adequately covered this subject.

Mr. Clerk, note on the face of this it was filed at 9:30 today—it was lodged at 9:30 today.

The Clerk: Yes, your Honor.

The Court: It is rejected in its form for not timely presentation. I covered it in substance."

Turning to the charge of the Court, the jury was advised as follows [Tr. 5081]:

"Now, you have heard me say, but I will say it again, the burden is always upon the government. The government accuses through the grand jury, which is an instrument of the government.

"The grand jury accuses and the United States Attorney prosecutes. The burden is always upon the prosecution, to show the defendants guilty.

"The defendants are not required to prove their innocence under our system of law. Now, they may

offer proof—they don't have to—they may rest upon a scrutiny of the evidence offered against them or they may offer proof. But in a strict sense they don't offer defenses. They might make contentions. They might offer testimony or other evidence here, but the burden is always upon the prosecution."

In view of the premises it is the position of the appellee that the Court was correct in refusing to give the untimely filed instruction choosing instead to cover it in substance in the charge. There was no error committed in this particular.

There Was No Error Committed by the Court in Refusing a Requested Instruction on Accomplice Testimony.

This ground like the foregoing ground is raised as a specification of error by appellant Duke but not argued further by him. Like the foregoing ground, it is stated in violation of Rule 18(2)(d) of this Honorable Court *(supra)* in that the particulars are not alleged in *totidem verbis* as required therein. Appellant Duke's contention is not clear. He states, at page 37 of his brief, that the Court erred in "refusing to instruct the jury that in the circumstances of this case a conviction may not be had solely on the testimony of accomplices unless such testimony be corroborated by other evidence." It is submitted by the appellee that the following instruction given during the charge of the Court was broad enough to cover the field of accomplice testimony [Tr. 5089, 5090, 5091 and 5092]:

"If the crimes charged in the indictment were committed by any one, then under the evidence in this case and as a matter of law, the following witnesses were accomplices: Nicholas Spicuzza, Ray Curtis, Johnny Hadzima, Robert Helm, George Todd, Mary Ascani. There is a rule regarding the testimony of

accomplices. It is that a conviction may be had upon the uncorroborated testimony of an accomplice if the jury is satisfied beyond a reasonable doubt that the testimony of the accomplice is true and that it establishes the commission of the offense.

"However, the testimony of all accomplices is to be very cautiously received and very carefully scrutinized because of the position which that accomplice has in his former relations or claimed relations with the persons against whom he testifies, so you must carefully examine it and be very cautious about it. But if you do accept it, find that it is corroborated, or even if it isn't corroborated, if you believe it—of course, if you believe it you accept it—but in determining whether you believe it. I would urgently suggest to you that you check the other evidence to see what extent, if at all, the testimony of accomplices is corroborated by other persons, by the circumstances, by physical facts, by all the other evidence in the case.

"I have been handed up by one of the counsel one of the rules taken from a law book about accomplices, and it reads this way:

" 'Regarding the rule of law that the testimony of an accomplice or co-conspirator is to be scrutinized with caution. You are instructed that this does not mean that such testimony is necessarily to be rejected or necessarily to be accepted, but it is to be scrutinized with care, and unless you are satisfied that it is true, you should not accept it. You should only accept that testimony which you believe to be true. The mere fact that a man is an accomplice or a co-conspirator or that he might have even have moral guilt equal or greater to that of the person against whom he testifies, does not mean that his testimony is to be accepted. The final test is, did he tell the truth.'

"And if he did tell the truth, does that testimony show that the defendant committed one or more of the very specific offenses charged against him?

"Evidence that a defendant was in the company of or associated with one or more persons alleged or proved to have been members of a criminal conspiracy, standing alone, is not enough to show that such defendant was a member of the alleged conspiracy. In your deliberations you should bear in mind that guilt by association alone is a dangerous doctrine. It condemns one man for the unlawful conduct of another."

It is submitted there was no error committed by the Court in this particular.

It is further submitted that there was no error committed with regard to appellant Duke and that therefore the judgment of conviction must be affirmed as to him.

Louis Glenn Ballard.

In addition to the jointly raised errors heretofore discussed, appellant Ballard individually makes the following specification of errors and arguments thereon:

The Motion of Appellant Ballard for a Bill of Particulars as to Counts IV, V and VI Was Properly Denied.

Appellee has no quarrel with the general principle of law that an indictment should advise a defendant with sufficient particularity to enable him to prepare his defense and to safeguard him from further prosecution for the same act. (See general discussion this topic under heading relative to the substantive counts of the indictment under which appellants Duke and Ballard were charged). However, appellee does take the position that appellant Ballard has utterly failed to show by the facts of this particular case exactly how the government has failed in its burden so as to entitle him to his requested Bill of Particulars.

Generally, speaking a motion for a bill of particulars is addressed to the sound discretion of the trial court, and the exercise of that discretion denying the bill will not be disturbed on appeal unless it has been abused.

Wong Tai v. United States, 273 U. S. 77;

Kobey v. United States (1953, 9th Cir.), 208 F. 2d 583.

It is held that the proper function of a bill of particulars is two-fold, to state facts beyond those alleged in the indictment or information (1) so that the offense involved is sufficiently identified to enable the defendant to plead a conviction or acquittal thereon in bar of a possible second prosecution for the same offense; and (2) so that the defendant is sufficiently advised of the charge to enable him to prepare his defense and not to be surprised at the trial.

Tinkoff v. United States (1936, 7th Cir.), 86 F. 2d 868, cert. den. 301 U. S. 689, reh. den. 301 U. S. 715;

Remmer v. United States, 205 F. 2d 277 (judgment vacated and remanded on other grounds 347 U. S. 227, reaffirmed 222 F. 2d 720 (9th Cir., 1955)).

An examination of appellant Ballard's Petition for a Bill of Particulars and the Points and Authorities in Support Thereof [Clk. Tr. 18-25] reveals that the principal grounds relied on for the bill of particulars are those hereinbefore discussed, namely, that for various reasons the indictment did not charge any offense. Specifically objections were raised on such grounds that it was not clear who was actually to smuggle or clandestinely introduce into the United States the merchandise or, in what manner defendant participated in the conspiracy, or participated in the receiving, or selling and facilitating the transportation and concealment of the merchandise after

illegal transportation, or who did various physical acts alleged in the overt acts of Count IV of the indictment, etc. Such an attempted use flies in the face of the rule that it is not the function of a bill of particulars to force a disclosure of the government's evidence in advance of trial.

> *United States v. Kushner* (1943, 2nd Cir.), 135 F. 2d 668, cert. den. 320 U. S. 212.

The purpose of a bill of particulars is to define more specifically the offense charged. It is not for the purpose of disclosing in detail the evidence upon which the government expects to rely.

> *Fischer v. United States* (1954, 10th Cir.), 212 F. 2d 441, 445.

Particularly pertinent is the language in *Nye & Nissen v. United States,* 168 F. 2d 846, 851 (9th Cir., 1948), affirmed 336 U. S. 613, viz:

> "The information requested . . . appears to concern only the details of the evidence which was to be relied upon by the government in support of its charges; the times, places and persons involved in various evidentiary transactions, etc.
>
> ". . . although it may be true that defendants could not have known in advance of trial what various facts and circumstances were to be relied upon by the government as proof of the alleged conspiracy, this does not necessarily indicate they were prejudiced by the denial of the motion. The government should not be compelled by a bill of particulars to make a 'complete discovery' of its entire case."

Accordingly, the government is not required to lay before appellant its entire case in all its details and ramifications.

> *American Tobacco Co. v. United States* (1944, 6th Cir.), 147 F. 2d 93, 117, affirmed 328 U. S. 731 (1946).

Manifestly, the real purpose of appellant Ballard's Motion for a Bill of Particulars was to have furnished to him a summary of the evidence upon which the government proposed to rely to sustain the averments of the indictment. This is not the proper function of a bill of particulars and has been held not to be "cause" under Rule 7(f).

> *United States v. Blumberg,* 136 F. Supp. 275, 276;
>
> *United States v. Bryson,* 16 F. R. D. 477, 479.

It is submitted by appellee that appellant Ballard's request for a Bill of Particulars was properly refused under the well-known rule that a bill of particulars which constitutes a fishing expedition into the government's case will be refused.

> *Maxfield v. United States* (9th Cir., 1945), 152 F. 2d 593;
>
> *United States v. Kushner* (1943, 2nd Cir.), 135 F. 2d 668.

It is submitted that the indictment is sufficiently clear to fulfill all the requisites of a valid indictment. Additionally, prior to trial Ballard was served with a factual summary. No objection was made by him to the sufficiency of this summary. Accordingly, it is further submitted that the Court committed no error in denying appellant Ballard's Petition for a Bill of Particulars.

Appellant Ballard Was Not Entitled to a Severance From His Codefendants and His Motion for Separate Trial Was Properly Denied.

Appellant Ballard moved prior to trial for a severance from his fellow defendants and a separate trial. It is from a denial of his motions that this ground of appeal arises. Ballard contends that he was prejudiced by the introduction of evidence by the government relative to Counts in which he was not charged. Since he was only charged in three out of ten counts he submits that to try him with his co-defendants Duke and Buono was to submit him to the evils inherent in a mass trial. It is his position that had he been separately tried he would have been acquitted. As an example of the prejudice resultant from his consolidated trial, appellant Ballard quotes the colloquy between Court and counsel (heretofore quoted *supra*) at the time that the Court endeavored to clarify the various theories of defense employed by the respective defendants [Tr. 3213, 3214]. It is urged that this discussion seemed like an argument to Ballard to the prejudice of Ballard. Ballard reads prejudicial significance into the remark of the Court that "I suppose also that includes the defense, so far as the conspiracy is concerned, because conspiracy was over a considerable period of time when Ballard was present, at least within the area in which the conspiracy supposedly operated." [Tr. 3214]. Inasmuch as Ballard was charged with conspiracy in Count IV of the indictment it is submitted that it would be only normal for the Court to make the above quoted statement. Furthermore, it is alleged, although in no way explained, that for Ballard to explain or clarify his defensive theory to the Court in some way denied his constitutional rights in violation of the Fifth Amendment to the United States Constitution. Further significance is attributed to the fact that while Duke, Ballard and Buono were all charged on Counts IV, V, and VI, appellant Buono was acquitted as to those counts while

appellants Duke and Ballard were convicted. Ballard evidently takes issue with the verdict of the jury in this regard and indicates that it is a manifestation of the prejudice redounding to Ballard by reason of his being required to go to trial with his codefendants. It is submitted that appellant Ballard in no way shows any abuse of the traditional discretion vested in Federal Judges to decide whether or not to grant motions for separate trials. The exercise of this discretion is as free and unfettered in conspiracy cases as in any other type of action. This principle is firmly established in this Circuit. In *Olmstead v. United States* (1927, 9th Cir.), 19 F. 2d 842, this Honorable Court stated at page 847:

> "In conspiracy cases the rule in the federal courts is that severance is permissible, and that the courts are vested with judicial discretion to order it, but that the exercise of that discretion is not subject to review except for abuse. United States v. Ball, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 400; Heike v. United States, 227 U. S. 131, 33 S. Ct. 226, 57 L. Ed. 450, Ann. Cas. 1914 c. 128; Scheib v. United States (C. C. A.), 14 F. 2d 75. We are not convinced that there was abuse of discretion in denying the application. It appears that upon the trial the defendant Finch testified in his own behalf, and it does not affirmatively appear that his defense was in any way hampered by his inability to adduce testimony from others."

Likewise the rule was recently restated by the Supreme Court in the celebrated case of *Opper v. United States* (1954), 348 U. S. 84, wherein the Court stated at page 94:

> "Petitioner's final complaint arises out of the fact that the conspirators were tried jointly. The petitioner feels that the jury might have become con-

fused and improperly considered statements of co-defendant Hollifield in reaching its verdict as to petitioner. Other than this general possibility of confusion, he points out nothing specifically prejudicial resulting from the joint trial. The fact that the Court of Appeals below reversed on two counts because of lack of evidence independent of statements of Hollifield is emphasized to bolster this claim of error as to the remaining counts.

"*It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally* and there is nothing in the record to indicate an abuse of such discretion when petitioner's motion for severance was overruled. The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements was not to be considered in establishing the guilt of the petitioner. To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from a joint trial. The record contains substantial competent evidence upon which the jury could find petitioner guilty."

As in the *Opper* case the Court below clearly charged the jury that they should consider guilt on an individual rather than mass basis. Thus, the Court stated [Tr. 5093]:

"Mr. Ballard has raised some objection to having to stand trial here with the other two, because Mr. Ballard is named in only three counts. Of course, as to each defendant you will give that defendant the benefit of special, particular consideration of that defendant, as to the counts in which he is charged."

It is submitted by the appellee that the foregoing authorities conclusively support the action of the Court below in denying appellant Ballard a separate trial.

The Court Did Not Err in Giving Its Instructions Relative to Appellant Ballard's Alibi.

Appellant Ballard next contends that he was prejudiced by the following instruction of the Court [Tr. 5094]:

> "The defendant Ballard has also offered some evidence of what we know in law as an alibi. An alibi is a circumstance of a person not being present at the time that an offense was committed. You should scrutinize the testimony of the persons who told you that Mr. Ballard was in Santa Barbara at the time that certain prosecution witnesses said that he was at some other place. Analyze it. And, of course, the burden is always upon the government to show that the defendant is present at the place where he was supposedly committing the offense."

It is admitted by appellant Ballard that the foregoing instruction may have been "toned down" by jury instruction 17 subsequently given at the instance of Ballard's counsel. This curative instruction provided [Tr. 5113]:

> "You are instructed that there has been introduced on behalf of the defendant Louis Glenn Ballard, evidence that on May 13, 1953, he was not at Desert Center, California, at a time, as is contended by witnesses for the government, but that he was at Santa Barbara, California, that it was therefore physically impossible for him to have been at Desert Center, California, and to have committed the acts charged by the witnesses for the government. This defense is what is known in law as an 'alibi'. This testimony has bearing on Counts IV, V and VI of the indictment. If from this evidence on the question of alibi you entertain a reasonable doubt as to the guilt of

> defendant, Louis Glenn Ballard, it would be your duty to return a verdict of not guilty as to defendant Ballard as to Counts IV, V and VI of the indictment.
>
> "You are to bear in mind that it is not required that the alibi of defendant, Louis Glenn Ballard, be established beyond reasonable doubt or even by a preponderance of the evidence, it is sufficient of the evidence of alibi raises in your mind a reasonable doubt as to the guilt of the defendant Ballard, and if it does, you should find the defendant Ballard, 'not guilty'."

While conceding the partrial curative effect of the foregoing Instruction 17, appellant Ballard asks the question (Ballard Br. 32), "But can it be said when the jurors heard the instruction of the Court stating that the jurors should scrutinize the testimony, they did not reach the conclusion that these alibi witnesses were unreliable." This contention can best be answered by a reiteration of the language of the Supreme Court in *Opper v. United States* (1954), 348 U. S. 84, 95 *(supra):*

> "To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. *Our theory of trial relies upon the ability of a jury to follow instructions."* (Emphasis added.)

In addition, at the time the Court gave the above quoted Jury Instruction 17, appellant Ballard's attorney conceded that such instruction if given would "correct the existing hiatus" [Tr. 5113].

The Court Did Not Err in Permitting Competent Government Evidence to Be Introduced Against Defendant Ballard by Way of Rebuttal.

Appellant Ballard lastly alleges that certain evidence was wrongfully admitted by the Court in rebuttal in that said evidence failed to rebut any element of Ballard's case. The particular evidence is discussed at some small length on pages 33, 34 and 35 of Ballard's Brief, however, a detailed discussion of the evidence is not essential at this point because as appellant Ballard concedes "the testimony of Miller, Springman, Crump and Giger would have been admissible in the government's case in chief, but actually rebutted no evidence offered in Ballard's defense." It is thus contended by Ballard that the Court by admitting the complained of evidence in the government's rebuttal prejudiced appellant. There is no showing in what way appellant Ballard was allegedly prejudiced. The short answer to this contention is that in the Federal Courts it is within the discretion of the trial court to allow evidence in rebuttal which might have been offered in chief.

Stone v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co., 53 F. 2d 813;

Erie R. R. Co. v. Kennedy, 191 Fed. 332;

Wilmoth v. Hamilton, 127 Fed. 48;

Casey v. Seas Shipping Co. (2nd Cir.), 178 F. 2d 360.

Vic Buono.

In addition to his joint participation in raising the question heretofore discussed concerning the validity of the indictment to charge a violation of 18 U. S. C. A., Sec. 545 *(supra),* appellant Buono raises only one additional error.

Appellant Buono Was Properly Convicted of the Conspiracy Charged in Count VII of the Indictment.

Appellant Buono makes the argument that his conviction on Count VII of the indictment must be reversed inasmuch as, its alleged, the purposes and time of the conspiracy therein contained, are identical with the purposes of the conspiracy alleged in Count IV, of which he was acquitted. It is Buono's contention that the facts alleged and evidence adduced establish but one conspiracy and that Count VII which alleged a conspiracy on which Buono was convicted was in fact merely a part of the conspiracy alleged in Count IV of which Buono was acquitted. There follows at pages 14 through 16 of Buono's Brief, an able discussion on the theory of multiple conspiracies. Many cases are cited in support of appellant Buono's contention that there is one rather than several conspiracies present in the instant case. A review of these cases reveals, however, that in each case the existence of one or many conspiracies, was dependent upon the facts in each respective case as shown by the evidence. Thus, in *Kotteakos v. United States,* 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557, the Supreme Court held that the evidence showed not the single conspiracy charged in the indictment but rather a group of independent conspiracies tangential to each other only in that they revolve around a central figure. In both *Bridgeman v. United States* (9th Cir.), 183 F. 2d 750, and *United States v. Witt* (2nd Cir.), 215 F. 2d 580, it was decided on the basis of the facts of the case that the evidence showed not one but several conspiracies. Thus,

the United States contends that the question of the number of conspiracies here present must be determined solely with reference to the evidence. In this connection it is so well-established as to need no citation that in determining an evidentiary question on appeal, the evidence must be interpreted in favor of the appellee and all presumptions and inferences which may be drawn from the evidence must be drawn in his favor.

Turning to the evidence, it is the contention of the appellee that the proof clearly establishes the existence of three separate and individual conspiracies. This is true even though they had during certain periods common members, operated at the same time and in some instances had similar objectives.

Counts I, IV and VII are the conspiracy counts in the indictment. Count I charges the so-called smuggling conspiracy *(supra)* and names as conspirators appellant Duke, Fred Steiner, Nicholas Spicuzza, Olive Spicuzza, John W. Hadzima, Chester W. Walzberg, Charles Walker, George Todd, Roy Pursselley, George Monolias, Samuel Segovia, Donald F. Hamm, Edward V. Ling, and Robert Helm. The time covered by this conspiracy was from January 1953 until April 1953, and the place of operation was San Diego and Imperial Counties, California. In discussing the evidence on these counts reference is made to the extended discussion of the evidence contained heretofore in Statement of the Case *(supra)*. For purposes of this discussion suffice to say that the evidence taken in the light most favorable to the government showed that certain of the unindicted conspirators were engaged in the smuggling of psittacine birds; that appellant Duke became the attorney for these persons; that Duke introduced to these smugglers, Robert Helm, an aviator who was likewise a client of Duke's; that as a result of this introduction a conspiracy was formed to bring psittacine birds into the United States from Mexico by means of an airplane and

that pursuant to this illegal agreement certain numbers of psittacine birds were smuggled into the United States and the profits split up among the co-conspirators. Thus this count (I) is supported by evidence showing a general smuggling conspiracy over the period of January through April of 1953.

Count IV is one with which appellant Buono is concerned. This count charges the so-called hi-jack conspiracy. It commences in April 1953 immediately following the cessation of the general smuggling conspiracy charged in Count I. The locale of the conspiracy in San Diego, Riverside, and Imperial Counties, California. Different parties were engaged as conspirators here, namely, appellants Duke, Ballard, Buono, along with John W. Hadzima, Phyllis Hadzima, Mary Ascani, Roy Pursselley, and Robert Helm. It will be noted that conspicuously absent from this conspiracy were Fred W. Steiner, Nicholas Spicuzza, Olive Spicuzza, Chester Vossberg, Charles Walker, George Todd, George Monolias, Samuel Segovia, Donald Hamm, and Edward Ling, all of whom were co-conspirators in the general smuggling conspiracy charged in Count I. The evidence adduced showed that during the month of April 1953, appellants Buono and Duke conferred with Hadzima and Helm and as a result of such conference an illegal agreement was formed whereby Helm would pretend to cooperate with Spicuzza and Todd who were apparently still engaged in the smuggling of psittacine birds. Helm was to fly birds for Spicuzza and Todd from Mexico into the United States. He was, however, to notify appellant Duke of the proposed schedules and landing places. On May 13, 1953, Helm notified Duke that Spicuzza and Todd were to receive a load of birds from Helm at Desert Center, California. Pursuant to this information, Duke directed co-conspirators Pursselley, Ballard and Hadzima to go to the place of landing and steal or "hi-jack" the birds. This plan was carried out at

gun point and the birds when taken from Spicuzza were transported to the aviary of Mary Ascani in Burbank, California, by appellant Ballard and conspirators Pursselley and Hadzima. As a result of this successful hi-jack sums of money were given to appellant Duke and appellant Buono respectively. As to Count IV, it can be seen that the evidence establishes an independent conspiracy covering a different time and having different members and being directed to a different purpose than was the conspiracy charged in Count I.

Count VII charged a conspiracy commencing in June of 1953 and continuing until October 1953. As is pointed out by appellant Buono, the period involved in Count VII falls entirely within the period contained in Count IV. However, the locale is different, the allege conspiracy taking place in San Diego, Imperial, and Los Angeles Counties, the personnel is different comprised in this case of appellants Duke and Buono and Helm, Spicuzza, Todd and one Albert W. Appel. The evidence showed that due to the hi-jacking the fortunes of Todd and Spicuzza in the smuggling business were at a low ebb; that appellants wishing to keep the others in business so that they might hi-jack them further in the future, agreed with Spicuzza and Todd to see to it that further hi-jacking was stopped. In addition, in order that Helm might continue to bring in the birds it was necessary that he have a new airplane and the acquisition of this airplane was vital for this conspiracy. Accordingly, appellants Buono and Duke met with Spicuzza, Todd and Helm and as a result of that meeting appellant Buono secured certain monies from Albert W. Appel and with these monies, Helm purchased an airplane with which to fly in merchandise from Mexico; and that once getting the plane Helm did so fly in various and sundry psittacine birds from Mexico into the United States. It is submitted that even though the period occupied by the conspiracy charged in Count VII fell within

the period of the conspiracy charged in Count IV not only were the purposes of the participants different but the objects of the conspiracies were at cross purposes. It is, therefore, submitted on the authority of *Kotteakos v. United States,* 328 U. S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239, that the evidence here shows separate conspiracies rather than one large single one. Accordingly, it is submitted that acquittal of Buono on the conspiracy charged in Count IV did not merely by reason of the fact that Count IV covered a greater period within which existed the conspiracy charged in Count VII, acquit appellant Buono of the charges under the other conspiracy count. There is no error present in this regard.

Conclusion.

The various grounds urged by the three appellants for reversal have been extensively treated in the body of this opinion. It would be belaboring an already overly long brief to attempt to restate them even in capsule form at this point. Suffice to say that it is the position of the appellee that the grounds taken are without merit and should be denied. However, as is apparent from the record this was a long and tedious trial. It was beset with many collateral issues and it would not be surprising if somewhere in the record some error may be found. However, a reading of the record leaves one with the firm conviction that the guilt of these three appellants is firmly and conclusively established. In this regard it is axiomatic that error may be disregarded in the face of overwhelming evidence of guilt.

Ippolito v. United States (1946, 6th Cir.), 108 F. 2d 668;

United States v. Tramaglino (1952, 2nd Cir.), 197 F. 2d 928;

Lutwak v. United States (1953), 344 U. S. 604;

Morgan v. United States (1938), 98 F. 2d 473;

Landay v. United States (1939, 6th Cir.), 108 F. 2d 698, cert. den. 60 S. Ct. 721, 309 U. S. 681, 84 L. Ed. 1024;

Burstein v. United States (9th Cir.), 178 F. 2d 665;

Bennett v. United States (1956, 9th Cir.), June 15, 1956, No. 14,551;

Robbins v. United States (1916, 9th Cir.), 229 Fed. 987;

Simmons v. United States (1941, 9th Cir.), 119 F. 2d 539, cert. den. 62 S. Ct. 78, 314 U. S. 616, 86 L. Ed. 496.

In view of the premises, it is respectfully submitted that the judgments of conviction below must be affirmed on all counts as to all defendants.

Respectfully submitted,

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